

A CENTURY OF ROMANCE  
OF THE  
ANNANDALE PEERAGES.  
1792-1894.



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A Century of  
Romance  
Of the Annandale Peerages  
with  
Letters of Henry, Lord Brougham,  
Lord Chancellor  
1792-1894

BY  
SIR WILLIAM FRASER, K.C.B., LL.D.

*(Reprinted from The Annandale Family Book)*

1894



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## LITHOGRAPH OF LETTER—

Henry, Lord Brougham, Lord Chancellor, to Lady Mary Hope  
Johnstone [16 May 1834], and addressed Envelope, *between* 22-23

# A CENTURY OF ROMANCE OF THE ANNANDALE PEERAGES.

WITH LETTERS OF HENRY, LORD BROUGHAM,  
LORD CHANCELLOR

1792-1894.

No history of the family of the Johnstones of Johnstone, Earls and Marquises of Annandale, would be complete without a notice of the claims to the peerages of Annandale. These have been before the House of Lords as subjects of contest and litigation for upwards of a century, and are still not finally decided by that august tribunal. This, together with the many eminent lords-chancellor who have heard and adjudged upon the particular claims, the array of able and learned counsel at the English and Scottish bars who have been engaged in them, the amount of evidence which has been adduced, the number of the printed cases and speeches, the difficulties encountered, and the several intricate points in peerage law which have been settled, all concur in constituting the Annandale case as one of the most celebrated which has engaged the attention of the House of Lords, and as one which has occupied it for a longer period than any other.

In the exhaustive memoirs of the first Earl of Hartfell, the first Earl of Annandale, and the first Marquis of Annandale, which are given in the first volume of this work, the history and creation of their respective peerages of Johnstone, Hartfell, Annandale, Annand, Lochmaben, Moffatdale and Evandale, are all minutely detailed, and must be referred to for the origin and creation of these respective peerages. But it seems necessary to supplement these Memoirs with the present statement to explain, if possible, why it is that all these peerages, the original patents of which under the Great Seal are all existing and entire, and duly registered in the Great Seal under their respective dates, with more claimants for them than ever appeared in any other case, should have remained for upwards of a century entirely dormant.

In making such a statement and review, it is not intended to cast any ungenerous reflection on the august tribunal of the House of Lords, or on any individual member of that great assembly, from the lords-chancellor who have taken part in the long-continued hearings of the case, or on any of the claimants or counsel acting for them from time to time. But it does seem strange that these peerages, on the claims to which vast learning and means have been expended, should still be in a state of dormancy. Even our great national novelist, Sir Walter Scott, has expressed his regret that the name of Johnstone, whose estates were so extensive, and still so nearly entire, should have dropped from the roll of Scottish peerages, when these estates have been inherited by and are in such worthy hands. The statement which follows is chiefly founded upon the officially printed Minutes of Evidence in the Annandale peerage proceedings, the official reports by shorthand writers of the speeches of counsel, and other papers in the Annandale charter-chests.

The century of litigation which has taken place in reference to the Annandale peerages may be divided into three epochs or stages in the progress of the claims to the peerages.

### FIRST PERIOD.

From 29th April 1792, when George, third Marquis of Annandale died, to 15th May 1834, the date of the proposed judgment by Lord Chancellor Brougham in favour of the claim of the late John James Hope Johnstone, Esquire, of Annandale.

#### THE JOHNSTONES OF WESTERHALL AND THE ANNANDALE PEERAGES.

##### CLAIMS MADE BY THEM, 1792 AND 1805.

After the death of George, third Marquis of Annandale, Sir James Johnstone, Baronet, of Westerhall, was the first to lay claim to the Annandale peerages. He claimed to be heir-male general to the third marquis, and to be descended from a Matthew Johnstone, who he averred was the second son of Adam Johnstone of Johnstone, owner of the Johnstone estates in the year 1413-1454. In anticipation of the marquis dying without issue, the Westerhall family had over a lengthened period made extensive investigations to discover proof of their descent. Their opportunities for doing this had been peculiarly favourable to them. Both the father and grandfather of the claimant were advocates at the Scottish bar, and were successively employed as factors or otherwise on the affairs of the Earls and Marquises of Annau-



dale. In this way, they had the freest access to the Annandale family muniments. In December 1742, when Sir James Johnstone, the father of the claimant, was acting as commissioner for George, third Marquis of Annandale, he had an inventory made of all the family muniments in the possession of the marquis. That inventory extended to six hundred folio ms. pages, and was completed in December 1744, having occupied two years in the preparation of it. As the inventory was prepared at the instance of Sir James Johnstone, it was delivered to him when completed. It remained in his hands for some time, and he got copies made of several parts of it, and also took notes therefrom which have since been preserved in the Westerhall family.<sup>1</sup>

On 7th March 1748, at an inquest commissioned by the High Court of Chancery of England, Marquis George was declared incapable of managing his own affairs, and to have been in that condition since December 1744. The marquis survived forty-four years after that finding of the Court. During this time the Johnstones of Westerhall were actively engaged in acquiring the fullest possible information in regard to the history and descent of the Johnstones of Johnstone and Annandale. Living in the same county of Dumfries in which the Annandale estates are situated, and several of their family being men of position and influence, and also acting with zeal and earnestness, the Westerhall family were accorded ready access to many of the county charter collections, including the repositories of Drumlanrig, which were perhaps the most extensive in Dumfriesshire. During the same period they also made exhaustive searches in the public records both of Scotland and England.

A few weeks after the death of George, Marquis of Annandale, in the end of April 1792, Sir James Johnstone of Westerhall presented a petition to the King claiming all the peerages which were held by the marquis. On 12th June thereafter the King referred the petition to the House of Lords, who, in turn, sent it to their Committee of Privileges. James, third Earl of Hopetoun, who was the grand-nephew of Marquis George, on 9th July of the same year, was retoured heir in special of the marquis, and, on the 20th of the month, he was infeft in the estate of Annandale. On 15th April 1794, Sir James Johnstone of Westerhall laid his printed case upon the table of the House of Lords.

The House ordered the Committee of Privileges to meet on 13th May to consider the case. On that day the Earl of Kinnoul presented a petition to their lordships on

<sup>1</sup> Printed case for Sir James Johnstone of Westerhall. Appendix, pp. ii and iii. Letters and papers in the Annandale Charter-chest show the existence of a belief that the in-

ventory was projected and made more in the interest of Sir James Johnstone than of the Annandale family.

behalf of James Johnstone, Earl of Hopetoun, craving to appear for his interest by his counsel at the hearing of the claim of Sir James Johnstone. The Earl of Hopetoun received an order of the House permitting him to appear by his counsel before the Committee, and be heard for his interest. In the meantime, on 3rd September 1794, between four and five months after lodging his case Sir James Johnstone died before the hearing of it had commenced. He left no issue, and his baronetcy and estates were inherited by his next brother, Sir William Johnstone. Sir William married the heiress of the Earl of Bath, and having added the name of Pulteney to that of Johnstone, he was frequently designated Sir William Pulteney, Baronet. The next claim that was made to the Annandale peerages by the Westerhall family was on 17th June 1805, when Sir John Lowther Johnstone of Westerhall presented a petition for them. While his claim was still in dependence, in December 1811, Sir John Lowther Johnstone died.

CLAIMS MADE TO THE PEERAGES BY THE EARL OF HOPETOUN AND THE  
JOHNSTONES OF ANNANDALE, 1795, 1816, AND 1820.

Prior to the claim of Sir John Lowther Johnstone a series of claims to the dormant peerages was commenced other than that made by the Westerhall family. When it became known that Sir William Pulteney did not intend to claim the Annandale peerages, the Earl of Hopetoun, in December 1795, presented a petition to the King claiming the titles of Earl of Annandale and Hartfell, Viscount Annan, and Lord Johnstone of Lochwood, Lochmaben, Moffatdale and Evandale. His petition was referred to the Committee of Privileges. The Earl took no further action.

Five years after the death of Sir John Lowther Johnstone a fourth claim was made to the Annandale peerages. The claimant was Lady Anne Hope Johnstone. Her ladyship was the eldest daughter of James, third Earl of Hopetoun, whose claim to the peerages has been already noticed. Lady Anne, on the death of her father on 29th May 1816, succeeded to the landed earldom of Annandale and Hartfell and lordship of Johnstone. She presented a petition in 1816 claiming the titles, honours, and dignities of Annandale, granted by the patent of 1661. Her ladyship died on 27th August 1818 while her claim was still in dependence.

Another claim to the still dormant peerages of Annandale was made in June 1820, when John James Hope Johnstone of Annandale, Esquire, the eldest son of Lady Anne, presented a petition claiming the peerages under the patent of 1661. The petition was referred to the Committee of Privileges on the 6th of July following.

PROCEEDINGS UNDER THE CLAIM OF JOHN JAMES HOPE JOHNSTONE,  
ESQUIRE, OF ANNANDALE.

The claim of Mr. Hope Johnstone did not come up for hearing till 28th April 1825. On that date counsel for the claimant and the Crown were called in. There was no appearance made for any other claimant than Mr. Hope Johnstone. That session of Parliament was devoted to leading evidence in support of his claim. During the sittings of the Committee there were produced on behalf of Mr. Hope Johnstone the four patents of the Annandale peerages created in 1633, 1643, 1661, and 1701; also evidence to prove his propinquity as well as other documentary evidence.

At the first sitting, on 28th April 1825, Mr. Adam opened the allegations of the petition. At the last sitting, on 23d June following, Mr. Keay summed up the evidence in support of the claim of the petitioner. In his speech Mr. Adam referred to the patent of 13th February 1661 under which Mr. Hope Johnstone claimed, dealing more largely with the question of construction, upon which he held the case must ultimately be decided. He stated the way in which the claimant connected himself with the titles, and laid down the rules of evidence in Scotland with reference to the construction of the limitations contained in the patent.

In the course of his speech, Mr. Keay stated the pedigree of Mr. Hope Johnstone. The heirs-male of the body failed in 1792, on the death of the last marquis, and the question arose who was the heir-female then. Lady Henrietta Johnstone, Countess of Hopetoun, was dead, and could not be the heir-at-law, and John, Earl of Hopetoun, her eldest son, was dead. It followed that James, Earl of Hopetoun, the grandson of her ladyship, being the eldest surviving son, and the successor of Earl John, was the heir-female. James, Earl of Hopetoun, had only daughters and no sons, and Lady Anne, his eldest daughter, was the next heir-female. As the patent of 1661, under which the present claim was made, provided that the honours should descend to the heirs-male of the body of the eldest heir-female, the claimant, Mr. Hope Johnstone, the eldest son of Lady Anne, held that he was entitled to the succession.

When Mr. Keay finished his speech summing up the evidence in support of the claim of Mr. Hope Johnstone, the Lord Chancellor asked if there was any report from the Lord Advocate upon the subject. The Attorney-General replied that the Lord Advocate had gone into Scotland and left it to the English lawyers. The Lord Chancellor demurred to proceed with a Scotch peerage case in the absence of the Lord Advocate, and the Attorney-General was not prepared to enter upon the subject

without further time. The case was therefore ordered to stand adjourned till next session.

#### CONSTRUCTION OF THE LIMITATIONS OF THE PATENT OF PEERAGES OF 1661.

When the Committee of Privileges again met on 6th March 1826, the Lord Advocate was heard in part on behalf of the Crown. Three days later, at a subsequent meeting of the Committee, he finished his speech, when the Attorney-General (Copley) also addressed the Committee in a speech of considerable length.

Both of the law officers of the Crown considered that Mr. Hope Johnstone's case turned upon the construction of the limitations of the patent of 1661. It has been already seen that this was the view taken by the claimant's own counsel. The Lord Advocate, and after him the Attorney-General, confined themselves in their speeches to the discussion of this question. The Lord Advocate said, "My Lords, the question, as I have already stated, on which this case turns is the construction of the patent granted by Charles the Second in favour of James, Earl of Annandale, dated in the year 1661. My Lords, I say, this is the only deed on which the question turns." The Attorney-General expressed himself in like terms. "I say frankly and fairly, that I rest principally upon the first ground, namely, upon the construction of the patent of 1661." Each of them dealt largely with the subject of the first limitation, which was to heirs-male. Upon this subject they combated the view advanced by Mr. Hope Johnstone that the term heir-male meant heir-male of the body. They argued that when applied to a Scotch title, in the sense of the law of Scotland, the phrase meant heirs-male general of the patentee, and not heirs-male of his body. They quoted authorities and precedents in support of this.

With reference to the charter of resignation of 1662, which was to the heirs-male of the body of James, Earl of Annandale, and which Mr. Hope Johnstone alleged reflected the meaning of the term "heirs-male" in the patent of 1661, the law officers of the Crown held that it was not admissible evidence on the subject. They said it was a charter not of the title but of the lands and estate belonging to it, and that the limitations or intentions expressed in it could not bear upon or assist in the construction of a former instrument. While assuming this attitude upon the bearing of the charter of 1662 on the patent of 1661, the Lord Advocate admitted that the different substitution of heirs in these two deeds was legitimate matter for wonder. He said the deed of 1662 "only goes to excite some degree of surprise that the patentee should choose to take his estates to a different description of heirs from that which was contained in his patent." Further, it was a charter of resignation, but the Lord Advo-

cate pointed out that, in his speech, Mr. Keay admitted there was no resignation of the honours of Annandale previous to the grant of this charter.<sup>1</sup>

The speeches of counsel for the Crown were replied to by Mr. Adam, on behalf of Mr. Hope Johnstone, on 13th March 1826. Mr. Adam's speech is a very long and elaborate one, extending to eighty-seven folio ms. pages. He displayed great ability in dealing with the several objections raised by the Crown. He disposed of the question of pedigree stated by the Lord Advocate. He showed by the retour of 1792, which he formerly put in evidence, that James, Earl of Hopetoun, succeeded as heir of provision to his grand-uncle, George, Marquis of Annandale, who died in that year; and that he could not have done this unless the first Earl of Annandale had but one son.

From the question of pedigree Mr. Adam proceeded to the legal question. He was confronted here with the dictum stated for the Crown, that in the absence of anything to explain the words, heirs-male are to be construed as heirs-male whatsoever. Mr. Adam, in opposing this, laid down the principle, that it is not to be presumed that the Crown has made a large grant where a grant of a more limited construction would explain the circumstances of the case. He therefore held that in the circumstances stated heirs-male should be taken as meaning heirs-male of the body, and that at any rate the matter was a fit subject for discussion at their lordships' bar. At the same time, in the present patent he conceived he might derive a strong argument from other terms contained in it.

#### THE EXTENDED CONSTRUCTION OF 'HEIRS MALE' RENDERS THE LIMITATION IN THE PATENT TO HEIRS FEMALE INOPERATIVE.

Upon the question that a patent of peerage is to be restrained and not extended, Mr. Adam made a statement about the intention of the sovereign in granting a patent of peerage, which led to the following colloquy between the law lords and counsel at the bar. Mr. Adam said that when the king intends to ennoble a person who has done the

<sup>1</sup> That admission upon the part of Mr. Keay, it will be afterwards shown, was a mistake. A resignation of his titles of Earl of Hartfell, Lord Johnstone of Lochwood, Moffatdale and Evandale, and of his whole lands and baronies, was made by James, second Earl of Hartfell, for a re-grant

thereof in favour of himself and the heirs-male of his body, whom failing to the heirs-female of his body. The resignation, which was made on 19th June 1657, was only discovered by the writer of this work in 1876 in the circumstances to be hereafter described.

country a benefit, his object is to ennoble the individual and the descendants of his body. It could not be supposed that it was his intention to ennoble the distant collateral heirs, who might be so far removed as neither to be the objects of interest on the part of the grantee nor on the part of his Majesty. The Lord Chancellor replied, referring to a case once heard at the bar of the house, in which it was proved that in different instances a person who had a grant of a Scotch nobility could sell it. Mr. Adam assented that this had been so in the case of territorial earldoms. The Lord Chancellor observed that in these instances a grant of dignity seemed to be taken as the intention of the king "not only to ennoble them, but to enable them to ennoble anybody else." Lord Redesdale said, "If the words heirs-male are to be construed in the extensive sense which has been argued, how could there ever be an extinction of the title, if you could only prove the fact of an heir, every descendant of Japhet might be a male through a male." Mr. Adam—"Any son of Adam and Eve, my lord." Lord Redesdale—"No, you may stop at Japhet. Shem and Ham are thrown out of the question." Lord Chancellor—"I remember they gave us one instance of a naval officer, who was a Scotch nobleman, and who made a nobleman in his place every time he went a voyage." Mr. Adam—"I believe Lord Rutherford was the lord to whom your lordship refers. He certainly on going abroad on the king's service made a will granting that title." Lord Chancellor—"Is not there a Scotch peer now whose ancestor received the nobility from the father of his wife, he giving up what in England they call her forfeiture, and, in Scotland, her tocher?" Mr. Adam—"Undoubtedly, my lord, there was great laxity in the grants. I believe, as far as I can trace, that that arose from the circumstances of the titles being connected with the land; and it was very much in consequence of their coming into commerce, to use the expression, as heritable offices are clearly still, that these circumstances took place." Lord Chancellor—"No one, I suppose, has examined all the cases so as to ascertain whether the cases that have been determined were grants both of the land and the nobility, in which you would apply the principle of a landed grant to the grant of nobility, or whether they were grants of nobility only." Lord Redesdale—"I want to know how it would be possible that this title could ever come to the daughter of the grantee, because if the extended construction of heirs-male is well founded it never could come to the daughter of the grantee." Mr. Adam—"That is what I intended to have taken the liberty of submitting to the house in the course of that I shall have to submit to your lordships." Lord Redesdale—"Unless there was some bastardy, or something of that sort." Mr. Adam—"Unless they could show that the original grantee was a bastard, that is the only situation of things in which it could be proved that the heirs-male of any one were extinct."

The argument which Lord Redesdale's remarks suggested was an important one, and was forcibly employed by Mr. Adam. "We are," he said, "in this situation, that I am for the claimant contending for restriction to be put upon the grant of the Crown. The law officers of the Crown are extending it by this most extraordinary proposition, which, though it may not increase, perhaps, the number of your lordships' house, may yet increase the number who are to send representatives into this house to a most extraordinary degree." But the necessity for this restriction was in this case made apparent, for, Mr. Adam further said, unless heirs-male was construed to mean heirs-male of the body, it was impossible that the particular object of the king's grant, namely, the introduction of heirs-female, could ever have effect. The Attorney-General alleged the necessity of showing that it was utterly impossible these heirs-female should ever succeed before the words heirs-male could be read to mean heirs-male of the body.<sup>1</sup> Mr. Adam denied this, and said it was only necessary to show that such a consequence would follow as would defeat the object which the party granting must have had in making that particular grant. He brought evidence to bear on the intention of the king in the patent to extend the title of Annandale to heirs-female. In this connection he referred to the 1662 charter. It had been represented as a mere conveyance of land such as the possessor of real estate in Scotland was entitled to demand as a right. It was, he showed, more than that. Among other characteristics of the charter, it granted a free barony, erected an earldom, and created a regality. It also contained a reference to the title granted in 1661, the intention of the Crown being to annex the franchises just mentioned to the title previously granted, and both to pass to the same series of heirs. In the same way he dealt with the remaining limitations in the 1661 patent in connection with the objections which the Crown counsel had brought forward.

<sup>1</sup> In opposing this, Mr. Adam quoted from a speech of a noble and learned lord in the House, Lord Eldon, Lord Chancellor, as follows: "In the case of Linplum the limitation was to Alexander, the second son of Hay of Drummelzier, and his lawful heirs-male. What was the object of the construction that heirs-male mean heirs-male general? To let in the younger brother of Hay of Belton, and to let in the younger brother of Hay of Lawfield. But what is the effect of this construction here? Your Lordships

see it is to be a construction to exclude, I do not say absolutely to exclude, but almost absolutely to exclude the younger sister until there shall be a failure of these heirs-male general of the elder sisters, for whom you look upwards, for whom you look downwards, and on this side and on that side; and in a family numerous and respectable as those Kers of Cessford, you never could look in vain for them, in all human probability, if you looked to all eternity."

RESOLUTION OF THE COMMITTEE OF PRIVILEGES ON THE CLAIM OF  
MR. HOPE JOHNSTONE.

The claim of Mr. Hope Johnstone as thus again set forth by Mr. Adam was considered by the Committee of Privileges at their adjourned meeting on 22d May 1826, when Lord Redesdale made a speech in which the Lord Chancellor, Lord Eklon, stated a general concurrence, to the effect that if there existed an heir-male collateral of the patentee he should have an opportunity of being heard, if advised. On the 25th of the month the Committee resolved as follows: "That the consideration of this petition be adjourned, and that the petitioner be required to lay before the House information whether there is any person capable of claiming as heir-male of James Johnstone, created Lord Johnstone of Lochwood in 1633, and Earl of Hartfell, Lord Johnstone of Lochwood, Moffatdale and Evandale in 1643, and whether James, his son, created Earl of Annandale and Hartfell, Viscount of Annan, and Lord Johnstone of Lochwood, Lochmaben, Moffatdale and Evandale in 1662, had any daughters or daughter; and whether such daughters or daughter (if any) had any issue male; and whether there is any heir-male of the body of the Lady Henrietta, daughter of William, first Marquis of Annandale, who married Charles, Earl of Hopetoun, and was great great-grandmother of the claimant; and if there are any such persons, that notice be given of this claim to such persons respectively, and that they be respectively at liberty to attend this House on the claim of the petitioner."

This resolution by the Committee for Privileges was a novel proceeding for which it would be difficult to find a precedent. It was a practical order by the committee that Mr. Hope Johnstone should advertise for claimants to come forward and claim the peerages, which he believed undoubtedly belonged to himself.

In obtempering the resolution of the committee, Mr. Hope Johnstone had advertisements repeatedly published in England, Scotland, and Ireland, with a view to discover if any such person or persons existed. The advertisements were dated 1827, and also 6th August 1828, and called for replies, intimating at the same time that the claimant intended to apply to the House of Lords to resume consideration of his petition and claim at the commencement of the following session of Parliament.

CLAIMS MADE BY SOUTER JOHNSTONS, AND LETTER FROM SIR WALTER SCOTT.

Following upon these advertisements, John Henry Goodinge Johnstone, of Bonnington Bank, near Edinburgh, intimated to Mr. Hope Johnstone his intention to claim the Annandale peerages. Others also came forward whose claims, shortly to be enumerated, were not ultimately prosecuted by them. The only one of these calling for any notice



is George Conway Montague Levine Wade Souter Johnston. About a century and a half prior to his claim, certain persons bearing the surname of Souter, in the shires of Perth and Forfar, with the permission of parliament adopted the surname of Johnston upon the tradition that their ancestors in the fifteenth century were Johnstons from Annandale.<sup>1</sup> The present proceedings in relation to the Annandale Peerage claims appear to have caused quite a flutter of excitement among the descendants of these Souters. At the election of a representative peer of Scotland at Holyrood, on 8 July 1824, Stewart Souter Johnston "claimed to vote as Marquis of Annandale, as being the lineal male descendant of Sir Adam Johnston of Johnston in Annandale," and his vote was received by the officiating Clerks of Session.<sup>2</sup> Sir Walter Scott and Mr. Colin Mackenzie were the two Clerks of Session. A doubt arose in their minds if they had done right in accepting the vote of the claimant. They wrote a letter to the Earl of Eldon, then Lord Chancellor. This letter, after narrating the particulars of the case, proceeds as follows:—

"But the question arose in our minds whether the vote of this claimant ought to be rejected in consequence of the resolutions of the House of Lords, the 13th of May, 1822, of which we have the honour to transmit a copy herewith to your Lordship.

"The prohibition introduced by these Resolutions applies itself to every heir of a peer deceasing more remote than a direct descendant or brother; but on the most mature reflection, it appeared to us that the words '*upon the decease of any peer or peeress of Scotland,*' were *prospective*, and could not be applied to the case of a person claiming in consequence of the decease of an ancestor prior to the date of the Resolutions. This view which occurred to us of the fair construction of the words was fortified by the consideration that a different interpretation of them would involve the necessity of refusing (till his title should be admitted in the House of Lords) the vote of every peer of Scotland now existing, who is not the lineal descendant or brother of his immediate predecessor.

"We could not bring ourselves to conclude that the House intended by the Resolutions in question to impose on several peers who have long been in undisturbed possession of titles acquired by collateral succession, some of whom have even sat in parliament as representatives of the Scottish peerage, the necessity of now bringing proof in support of their titles, and yet this consequence seemed inevitable, if by those Resolutions the Clerks were enjoined to refuse the vote tendered under the title of Marquis of Annandale.

"We hope that in our sincere endeavour to act in conformity to the will of the House of Lords, we have rightly interpreted that will, and we beg leave to subscribe ourselves, etc., etc."<sup>3</sup>

To that letter Lord Eldon never replied, and the point was left undecided.

Soon after the claim of Stewart Souter Johnston now described was made, or in

<sup>1</sup> Acts of the Parliaments of Scotland, vol. vii. p. 467.

<sup>2</sup> Record of Elections of Peers of Scotland in the General Register House.

<sup>3</sup> Report from Select Committee of the House of Lords anent the laws relating to elections of Representative Peers of Scotland. Appendix, p. 19.

February 1827, Mr. Thomas Souter Johnston made a similar claim in a petition to the King, but Mr. Secretary Peel declined to lay it before his Majesty.

George, the third Souter Johnston claimant to the Annandale peerages, in contrast to the other two, claimed descent from James, Earl of Annandale and Hartfell, through an alleged son of John, brother of William, first Marquis of Annandale. His petition containing his claim was submitted to the Committee of Privileges. But, as already stated, no further steps were taken on his behalf.

None of these persons of the name of Souter, or Mr. Goodinge, had any connection with the Johnstones of Annandale, and their claims to vote at elections of peers were quite unfounded. Yet it was some years later before such claims were put a stop to by the Act of Lord Eglinton for preventing abuses at the elections of Representative Peers. Mr. Goodinge also claimed right to part of the Annandale estates, but his claim to them was negatived by the Court of Session, as his claim to the Peerages was also negatived by the House of Lords.<sup>1</sup>

In the early part of 1830, Mr. Hope Johnstone resolved to prosecute his claim to the Annandale peerage in that session. Accordingly, by the beginning of February, Mr. Chalmers sent from London to Mr. Hope, W.S., a draft petition requesting the House of Lords to resume the consideration of the claim, and also a draft additional case. The petition was presented to the House of Lords on 7th April 1830.

The additional case prepared by Mr. Chalmers, from the short time available, was necessarily brief, extending to four pages of print. It allowed of another and more elaborate one being prepared a year later. The day of meeting of the Committee of Privileges was 7th May 1830. At that meeting, petitions of Mr. Hope Johnstone and Mr. Goodinge Johnstone were read. Mr. Adam appeared for Mr. Hope Johnstone; Mr. Dalzell for Mr. Goodinge Johnstone; and the Attorney General and the Lord Advocate on behalf of the Crown. Mr. Adam stated what had been done in pursuance of the order of the House contained in its resolution of 25th May 1826.

Mr. Dalzell thereafter stated the line of descent of his client, and requested six weeks in which to make out his case. When asked by the Lord Chancellor how soon he could be prepared to prove his pedigree, Mr. Dalzell replied he was in the course of collecting evidence from the coast of Africa. The Earl of Eldon, who was formerly lord chancellor, and who was present, remarked upon the reference to Africa, "I should think the determination of a Scotch cause has always a sort of 'slavery' connected with it; and probably a Scotch peerage. I suppose that is the analogy." The committee ordered the case of Mr. Goodinge Johnstone to be laid on the table within three weeks.

<sup>1</sup> 19th November 1839.

VOTE OF MR. GOODINGE JOHNSTONE AS MARQUIS OF ANNANDALE AT  
ELECTION OF REPRESENTATIVE PEERS.

Soon after this Mr. Goodinge Johnstone took another form of asserting his claim to the Annandale peerages. On 2d September 1830, sixteen representative peers of Scotland were elected. At the meeting of Scottish peers at Holyrood for this purpose, Mr. Goodinge Johnstone attended. Upon the name of the Marquis of Annandale being called, he gave in a protest alleging his descent through his mother as great-grandson to Lord John Johnstone, the brother of William, first Marquis of Annandale, and stating that he had been served nearest and lawful heir of line and provision to Lord John Johnstone, and that his petition was before the Committee of Privileges for establishing his right to the Annandale peerages. Upon these grounds he claimed a right to vote at the election of peers, and gave in his list accordingly. The protest was received by the presiding Clerks of Session.<sup>1</sup>

There are no printed minutes of evidence between 7th May 1830 and 20th March 1834. But a meeting of the Committee of Privileges was held on 27th July 1831. Previous to that date Mr. Hope Johnstone presented a petition to the House of Lords, in which, after rehearsing the resolution of the committee on 25th May 1826, as to making intimation of claimants, and the consequent steps he had taken in pursuance of it, he states—

“That since the circulation of these advertisements the following persons have appeared in this matter, viz. :—1. John Henry Goodinge Johnstone, Esq., claiming by petition to his Majesty and duly referred to your Lordships’ House, the same titles which are claimed by the present petitioner. 2. Sir Robert Graham, Baronet, claiming the same titles in a similar way. 3. William Greig Johnstone, claiming the title of the Earl of Annandale in a similar way. 4. George Conway Montagu Levine Wade Souter Johnstone, Esquire, by petition to your Lordships’ House, praying your Lordships to grant him time to procure evidence to establish his right to the Marquisate of Annandale; and 5. James Johnstone of Drum, in the county of Monaghan, Esquire, praying your Lordships to defer making any decision on the claims already made, for such time as would enable him to complete his inquiries.”

At the meeting of the Committee of Privileges on 27th July 1831, Dr. Lushington appeared for Mr. Hope Johnstone. Mr. Goodinge Johnstone was not represented at that meeting, nor any of the other claimants, nor even the Crown. Dr. Lushington stated that notice had been served upon each of the claimants, and that the object they had in view at that meeting was to crave their lordships to adopt some measure to appoint a day when the case of Mr. Goodinge Johnstone should be taken into consideration, or such course adopted as they might think fit, and they wished to know

<sup>1</sup> Record of Elections in the General Register House.

how their lordships proposed to dispose of the other claimants. Dr. Lushington obtained permission to lay an additional case for Mr. Hope Johnstone upon the table.

That additional case was prepared by his cousin, Mr. John Hope, then Dean of Faculty, and afterwards Lord Justice Clerk. The case, as it bears, was confined exclusively to the legal argument arising upon the terms of the 1661 patent, which is treated in an exhaustive manner. It extends to forty-eight printed folio pages, besides three pages of an appendix printed in small type. It was lodged soon after the meeting of the Committee above mentioned.<sup>1</sup> The case lodged by Mr. Goodinge Johnstone extended to twenty folio pages of print, with five pages of appendix.

No further meeting of the Committee for Privileges was held in relation to the Annandale peerage till 20th March 1834.

#### APPARENT PROSPECTS OF A SETTLEMENT OF THE PEERAGE CONTEST IN FAVOUR OF MR. HOPE JOHNSTONE.

When on 20th March 1834 the claim of Mr. John James Hope Johnstone again came up for hearing before the House of Lords, it had been nine years before that tribunal. During that time, as has been seen, the pleadings on behalf of the claimant, as well as those in opposition to his claim, had been almost exclusively confined to the point of construing the limitations of the patent of 1661, and especially the first of these limitations, which was to heirs-male. Yet the Committee had not seen its way to come to any decision either upon that or any other part of the claim of Mr. Hope Johnstone. Although not at this sederunt, yet during this session, hopes were raised, for which some valid ground at the time existed, that the case was now to be decided, and that Mr. Hope Johnstone was to have his claim to the Earldom of Annandale confirmed to him by a final decision of the House. It will be shown in the narrative which follows that these hopes were elusory ; and that the first of several protracted stages in the contest for the Annandale peerages was only to be reached after the lapse of other ten years. The Committee of Privileges were thus occupied for nineteen years in deciding whether the destination to heirs-male in the patent in question signified heirs-male of the body or heirs-male whatsoever.

There were two claimants for the Annandale peerages before the Committee of Privileges at their meeting on 20th March 1834, Mr. Hope Johnstone and Mr. Goodinge Johnstone. Both claimed as heirs-female under the same patent of 1661. They also claimed to be descended from two brothers, William, afterwards Marquis of

<sup>1</sup> The late Mr. James Hope, W.S., informed the writer hereof that his brother, the Dean of Faculty, devoted six weeks to the preparation of that additional case.

Annandale, and John, called Lord John Johnstone, both sons of the patentee, James, Earl of Annandale and Hartfell. The existence of this John was not admitted by Mr. Hope Johnstone at this stage of the proceedings. But he held that even if his existence as a son of Earl James, and as the ancestor of Mr. Goodinge Johnstone, should subsequently be proved ; yet, in the first place, he had a prior and better claim, as being the heir-female through the eldest son ; and next, while it would be necessary to show that this John, the male heir of the body of the grantee, had failed before he, Mr. Hope Johnstone, could come in as heir-female, it mattered not what heirs-female he might have, they could not claim against him.

#### ABLE SPEECH OF DR. LUSHINGTON, COUNSEL FOR MR. HOPE JOHNSTONE.

It has been shown that Mr. Goodinge Johnstone was unprepared to lay his case before the Committee at their previous meeting in 1830. Four years had intervened, and he was still unprepared. This tardiness was warmly resented by the Lord Chancellor, who subjected Messrs. Pollock and Wilson, counsel for Mr. Goodinge Johnstone, to a long and severe cross-examination relative to its cause. His lordship's strictures on the subject were no less severe. Addressing Mr. Pollock, he said, " It is a very odd sort of case ; I think not very likely to uphold the claimant." In these circumstances the Committee of Privileges was chiefly occupied with the summing up of Mr. Hope Johnstone's case by his counsel. This was done with great ability and learning. The two counsel employed were Dr. Lushington and Mr. Adam Anderson, afterwards Lord Anderson of the Scottish Bench. The former delivered his speech first. It displays close and powerful pleading, and extends to one hundred and fifty-six folio pages of manuscript. In the course of his speech Dr. Lushington affirmed that there was no case whatever where it had hitherto been decided that the terms *heredes masculos* had the extensive signification given it of heirs whatsoever where it was followed by a substitution of heirs-female of the body. An argument which was pleaded at some length in the speech, was in regard to the principle of descent, as being generally the principle found to prevail in most patents, and which pervaded the whole of the 1661 patent. The giving an extensive meaning to the words heirs-male, it was urged, violated this principle. The object of patents of honour is to ennoble the blood of the original grantee under the patent. Those naturally expected to succeed to the honour are the issue of the body. In the light of this principle, could it be the intention of the Crown, it was asked, that every one who could come in as heir whatsoever, should succeed preferably to an heir female of the body under the second destination in the patent ? In this connection counsel recalled the words of Lord Redesdale, already quoted, that

the effect of such a state of matters would be to call in the whole descendants of Japhet before allowing the destination to heirs-female of the body of the grantee to take effect. He said it was the principle of descent upon which the Roxburgh and Linplum cases had been decided in the House of Lords, adding,—

“I am looking to see what shall be the guide, I am looking to see what shall be the polar star in cases of doubt and ambiguity. I am looking to determine what interpretation a flexible term shall have, and the light which I seek to guide me through these paths of doubt and difficulty is the light of the principle of descent, and if, without violation of the terms, without showing a construction which is hostile to the plain and fair meaning of the words when I am speaking of a flexible term, I can show your Lordships that the more limited sense is consistent with the principle of descent, and that the more extended sense is a violation of the principle of descent, then I say that the decision in the case of Hay of Linplum is a decision in my favour.”

Again, as further illustrating his argument, Dr. Lushington said,—

“You are construing an instrument. What is a more effectual way of construing an instrument so as to attain the real meaning of the grantor than this.—You have a passage in it respecting which no doubt whatsoever can exist, and you have another passage in it respecting which doubt does exist. Now, I ask you, which is the more rational, which is the more intelligible, which is the more logical mode of construction, to give the doubtful passage such a construction as will undoubtedly carry into effect the undoubted passage, or to give the doubtful passage such an extensive operation and effect as shall to all intents and purposes destroy the intention of the grantor as clearly expressed in the passage respecting which your Lordships can entertain no doubt whatever?”

Dr. Lushington drew attention to the difficulty that if *ejusque heredes masculos* in the first substitution signified heirs-male whatsoever, then it is the very same construction as *heredes quoscunque* in the third substitution. He asked how he could put the same construction upon both? The Attorney-General said *ejusque heredes masculos* meant heirs-male. Dr. Lushington replied he took that for granted, but his argument was not affected by that. The Lord Chancellor interposed, “He will not call them twice over—first call them before the heirs-female of the body and then again after them.” Dr. Lushington said, “That is precisely my argument. . . . One of two alternatives takes place. If it means heirs-male whatever, then it is a repetition of what took place in the first clause. If it means heirs-female whatever, then as to part of the expression it is utterly without effect or operation.”

Introducing the charter of 1662, counsel proceeded to state that in this charter he found an instrument agreeing in all respects with the patent granted a few months before, with the exception that it explained more clearly the original destination, and the meaning of the words *heredes masculos*, and he took it as a contemporaneous

exposition of the patent, and by the parties best qualified at that period to judge of the true legal meaning and bearing of the terms in question.

Treating of the substitution in the patent to heirs-female of the body, counsel said Mr. Hope had expended great pains and care in explaining the origin, destination, and true meaning of the term heirs-female.<sup>1</sup> But he thought he could with the assistance he derived from his case satisfy their lordships as to the true meaning of the term without travelling through the learning with which he had adorned his statement. Little more was necessary, he said, than to point out from the high legal authorities given by Mr. Hope the passages upon which he relied. He showed that the daughter of a son would succeed before the daughter of the original grantee, and he presumed it was equally clear that if it would be so in the first generation and in the second, the same principle must follow throughout, whatever the lapse of time.

On the last words in the patent under this limitation, which was the destination to the heirs-male of the body of the said heirs-female, he said it was merely a continuance of the sentence pointing out the intention of the grantor as to the succession of heirs-female of the body.

Mr. Anderson, who was also counsel for Mr. Hope Johnstone, proceeded with his speech when Dr. Lushington concluded. The case of Mr. Hope Johnstone having been so fully stated by Dr. Lushington, he passed over all its details and merely added one or two observations on different points of law. In the first point which he took up, he founded an argument upon one of the contentions of the other side. The argument may be given in his own words. He proceeded to say—

“I may admit, my Lord, to the other side, that there are certain appropriate terms in the law of Scotland applicable to heirs-male of the body. We all know there are just the simple words ‘heirs-male of the body.’ But I hold it to be equally clear, and a point that will be conceded to me, that there are certain appropriate terms applicable to heirs-male general. These terms, as your Lordships well know, are ‘heirs-male whatsoever’; and heirs-male whatsoever are generally set in opposition to heirs-male of the body. Those are the peculiar and appropriate terms by which heirs-male general and heirs-male collateral are called to take in succession. Here your Lordships have simply the words ‘heirs-male’ to deal with, without having the adjunct of heirs-male of the body, or, on the other hand, of heirs-male whatsoever.”

<sup>1</sup> The Lord Advocate could not understand how the claimant should designate himself not heir-male of the body of the heirs-female, but simply heir-female. He speaks of it “as an unaccountable inaccuracy in the title put forward by the claimant.” The ms. copy of the speech in the Annandale Charter-chest had been submitted to Mr.

John Hope, Dean of Faculty, afterwards Lord Justice-Clerk. On the margin of the ms. opposite this expression there is this note holograph of the Dean—“What arrant nonsense. Lady Anne could not be the heir-female unless her father also was, and then she is not the heir-male of the heir-female. Hence Mr. Hope Johnstone can only be heir-female.”

On the question of the particular construction to be given to the term "heirs-male" in the patent of 1661, Mr. Anderson held that the rule applicable to the law of Scotland was that the object of a patent of honour being to ennoble the patentee and his descendants, where the words "heirs-male" occur alone they were to be taken as a limitation to descendants, unless it appeared from other words in the patent that collateral branches of the patentee were also to be called to the succession, which was not the case in the present instance. He also contended that to give the words in this case the wider meaning of heirs-male whatsoever, the one-half of the patent would thereby be rendered inoperative; for the House of Lords would insist upon all the different individuals who stand prior to the claimant being extinguished before he could be called.

"But," he added, "to extinguish all the heirs-male general, we know there are just as many Johnstones of Annandale as there are Kers of Cessford, and that therefore it would be impossible for any one claiming the character of heir-female to make out his claim to this peerage."

#### THE CLAIM OF MR. GOODINGE JOHNSTONE DISMISSED BY THE HOUSE OF LORDS.

At the meeting of the Committee of Privileges on 15th May 1834, we have the last of Mr. Goodinge Johnstone, who ought never to have been a claimant of the Annandale peerages. Evidence was led which extinguished John Johnstone, commonly called of Stapleton, his pretended ancestor. The Committee now accepted the pedigree of Mr. Hope Johnstone, and desired that the point of law be proceeded with. Mr. Pollock, counsel for Mr. Goodinge Johnstone, who was still unprepared to proceed with his case, and who pleaded that his client was not opulent, and that his evidence had to be obtained from distant places, was met with the smart rejoinder, by Lord Chancellor Brougham, "But he will soon cease to be opulent if he is to appear for ever and ever till you send backwards and forwards." He was told that he would not be again heard. The Committee had lost all patience with their obstructing claimant.

#### UNSUCCESSFUL SPEECH OF THE LORD ADVOCATE AGAINST THE CLAIM OF MR. HOPE JOHNSTONE.

The Lord Advocate, on behalf of the Crown, delivered a long and well-prepared speech upon the claim of Mr. Hope Johnstone. He did not, however, make much impression upon the Committee, and it will be enough to indicate the line of argument he adopted. He endeavoured to show that the limitation of heirs-male in all



the four patents of peerages was to be held as heirs-male collateral of the patentees, and not heirs-male of the body. On the second branch of the limitation of the patent of 1661, he contended that the limitation in favour of the heirs-female should commence with Lady Henrietta Johnstone, Countess of Hopetoun, and that the heirs-male of her body were to be preferred to the direct lineal heirs-female, which would exclude Mr. Hope Johnstone and bring in the Earl of Hopetoun.

The Lord Chancellor was certainly not convinced by the argument used by the Lord Advocate, as he not only followed him with a brilliant speech which was entirely favourable to Mr. Hope Johnstone, but even during the speech of the Lord Advocate he could not forbear showing his leaning to the side of the claimant. The following colloquy which ensued during the progress of the speech of the Lord Advocate is one of several instances of this :—

*“ Lord Chancellor—*This is what strikes me upon your last observation. Is not it a very rare thing to find a limitation to the heir-female and the heirs-male of her body upon the failure of heirs-male general? To find it limited upon the failure of heirs-male of the body of the patentee is a very intelligible limitation, but is it not a very rare thing to find a limitation to the heir-female and the heirs-male of her body upon the failure of heirs-male general, that is, of heirs-male whatsoever? And I will tell you why that should be very rare. It is intelligible that it should be limited to heirs-female upon the failure of heirs-male of the body, because that is limited within reasonable bounds, but as every man must have a father and a grandfather, could there ever be a case by possibility in which the limitation to the heir-female and the heir-male of her body could take effect if it were limited upon the failure of heirs-male general? Because there is no man in the world that can have a failure of heirs-male general; it must go up to Adam.

*“ Lord Advocate—*It would be difficult to trace it.

*“ Lord Chancellor—*The more difficult it is to find out the person so much the worse, for it makes the whole grant of the honour utterly inoperative. You cannot find out who is to take, for you cannot distinguish them, and consequently you cannot make the grant effectual. You understand what I mean—that limitations to the heir-female without division and to the heirs-male of her body is quite intelligible if it is to follow upon the failure of heirs-male of the body. But it is quite unintelligible to any practicable purpose to limit to heirs-female without division, and the heirs-male of the body of that heir-female, provided that is only to follow upon the extinguishment by legal evidence of all the heirs-male not of the body, but all the heirs-male whatsoever of the patentee. Because then you must extinguish all mankind, because every person connected with that individual by the most distant relationship must be extinguished before that limitation can come into operation.

*“ Lord Advocate—*I am quite aware (and I do not wish to disguise anything) that that makes against the argument I am maintaining. I am merely endeavouring to throw out such remarks as may guard your Lordships against allowing these honours to go to persons for whom they are not intended.

*“ Lord Chancellor—*It will be very useful if you can show us any instances.

*“ Lord Advocate—*I admit that it is very rare if there are any precise instances of it. . . .”

BRILLIANT SPEECH OF LORD CHANCELLOR BROUGHAM FAVOURING THE CLAIM OF  
MR. HOPE JOHNSTONE.

In the speech of Lord Chancellor Brougham, which followed immediately upon that of the Lord Advocate, his lordship said that the case derived a more than ordinary degree of importance from the nicety of the points of law which it raised. He stated the bearing of the different arguments on the opposite sides, and how far his opinion was made up upon any part of the case, either in respect of law or of fact, and how far it remained in suspense. He confessed that some of the considerations which had been presented to him in the course of the discussion left the question very nicely balanced, though he thought he saw his way through the whole to a decision, "notwithstanding the level posture in which the scales appear to hang." He admitted that the claimant had proved his pedigree to the satisfaction of the committee, and therefore that the question of law was raised cleanly and clearly upon the facts. He also held that he answered the description of heir-female of the patentee, although he judged that this was immaterial. The question of greatest importance, he said, was, "whether or not the limitation of this grant of honours is so conceived as to carry the dignity in the first instance to the heirs-male of the body, or whether it does not in the first instance give it to heirs-male general."

Lord Brougham was decidedly in favour of the first alternative, and a large portion of his speech is devoted to an elucidation of the point. He stated the scheme according to the argument against the claimant thus: "It was first the intention to grant to all heirs-male whatsoever without any restriction. It was secondly the intention to call heirs-female. It was third the intention to do what? To call for the second time those heirs-male general who had been called before, and who therefore never could answer, for they had been of necessity exhausted before the heirs-female could come in; and lastly heirs-female general were to be called." This construction his lordship said was unusual and absurd, and they were not forced by anything in the instrument to impose it. They were rather justified in not imposing it. The opposite construction he insisted avoided giving such an uncouth aspect and anomalous character to the whole limitation.

The Lord Chancellor was equally strong and emphatic in holding that the heirs-female were the most especial object of the grantor's care. Referring to "the anxious and superfluous particularity" of the description of these heirs used by the grantor, he says, "You have therefore five descriptions of a succession of female heirs-general, where one would have sufficed, showing most clearly the intention that

those should be called as favoured and special objects of the royal favour." The inference which his lordship drew from this may be given in his own words, which will show how very decided his convictions were. He says—

"If there is one purpose more certainly defined than another, and meant to be more precisely fulfilled in this charter, it is that the limitation should have effect which carries the honours in a certain event to heirs-female. The question is in what event? And that is the whole question. Shall we, or not, adopt such a construction of the words which indicate the event I allude to as must absolutely, and with perfect certainty, frustrate to all intents and purposes this anxious limitations to heirs-female? For that is really the inevitable consequence of construing heirs-male as heirs-male general; I cannot get over it; I feel the greatest difficulty in doing so; I feel it quite insurmountable. I listened attentively to the argument ably maintained on the other side. I am aware of the force of '*heredes masculos*,' and agree that without more, it designates the heirs-male general. I observe the binding up of the title of the threefold grant; I do not shut my eyes to the former part of the recital. I do not overlook the singular grant of precedence. I am not insensible to the somewhat inconsistent aspect which the gift wears when the precedence is given to one set of heirs by reference to a former grant of honours to another set of heirs. But, I can still less shut my eyes to this consideration, that if I am to adopt the construction to which these difficulties are said to drive me, I am also driven to the necessity of holding that all the machinery is utterly useless whereby the right of the heir-female is so curiously and elaborately raised, and that every word relating to heirs-female '*heres femella*,' '*natu maxima*,' '*absque divisione*,' '*ex corpore dicti Jacobi comitis de Hartfell hactenus procreata*,' and then '*procreanda*,' with the provision as to the arms, and the name '*in omni tempore affuturo*,' that all this is to become utterly useless, and might just as well have been left out—for what is the inevitable consequence as regards this female limitation upon that construction? It is that until all the persons are extirpated who can connect themselves with James, Earl of Hartfell—the first patentee of the honours by males alone—this limitation to the heirs-female is waste paper. But I go further, not only till in fact they are all gone, not only till *in rerum natura* none such exist, but till some heir-female '*natu maxima absque divisione ex corpore dicti comitis procreanda*,' or till some '*heres masculus ex corpore dictæ heredis femellæ natu maxima legitime procreandus*' comes into existence . . . and produces strict legal evidence . . . and is able to extinguish all mankind connected by males alone with the patentee of the honours: till that is done, all the provisions for heirs-female and the heirs-male of their bodies is waste paper."

To these and other like remarks, his Lordship added the strong statement—

"If this limitation to the heirs-female is a limitation upon the failure of heirs-male whatsoever and not of the body, the conclusion is inevitable that it never can by possibility be made available to any human being while the grass grows or the rain falls, because no man can prove the extinction by legal evidence of all persons who may by possibility connect themselves with James, Earl of Hartfell, the first patentee through males only."<sup>1</sup>

At the close of his speech, Lord Brougham recommended the Committee to postpone the further consideration of the question for a short period only, as he was desirous that

<sup>1</sup> Speeches of Lord Chancellor (Brougham), 15th May 1834, and Lord Chancellor (Lyndhurst), Lord Brougham and Lord Campbell, 11th June 1844, pp. 9, 10.

a final decision should not be delayed beyond a very few days after the Whitsun recess. To this request the Committee agreed.

Although that speech of Lord Chancellor Brougham was not a final and formal judgment by him on the whole case, it showed throughout every portion that it had been prepared with very great care and wealth of language, of which the speaker had such an unlimited command. It was admittedly favourable to the claim of Mr. Hope Johnstone.

CONGRATULATORY LETTER FROM LORD BROUGHAM, AND HIS DECLARATION THAT MR. HOPE JOHNSTONE HAD MADE OUT HIS CLAIM TO THE ANNANDALE PEERAGE.

The younger of Mr. Hope Johnstone's sisters was Mary Hope Johnstone, who being one of the maids of honour of Queen Adelaide, was styled the Honourable Mary Hope Johnstone. She was on friendly terms with Lord Chancellor Brougham, and after his luminous speech in favour of her brother on the 15th May 1834, she wrote to his lordship a cordial letter of thanks. He acknowledged her letter and made a holograph answer in the following terms :—

“Friday Night [16 May 1834].

“MY DEAR LADY MARY,—I am resolved to have the first gratification of calling you by your real name.

“Many thanks for your kind and hearty note. I do assure you that, tho' there is always the greatest pleasure in distributing justice, (and it is almost all the pleasure I now have in life) I never felt it more strongly than upon this occasion.

“It gives me a great pleasure besides to tell you that the opinion of the lawyers is very decidedly in favour of my judgment of yesterday. You are now secure of your promotion, and I am your ladyship's sincere friend,

H. B.”<sup>1</sup>

Address on envelope—“The Lady M. H. Johnstone.”

<sup>1</sup> There is another letter from Lord Brougham to Mary Hope Johnstone in the Annandale Charter-chest, which, although not bearing on the question of the peerage, has reference to a well-known incident in the life of Lord Brougham, and shows the intimate terms existing between the two, and may be introduced here. The letter is undated :—

“BROUGHAM, Sunday.

“DEAR MISS H. J.—1000 thanks for your kind letter, and to all your Melville Castle circle. I am extremely angry at the ass or wag who hoaxed all mankind and all womankind (except Dulcy, as she says). He never would have succeeded for a moment if the two men I wrote to (A. Eden and Miller, my old clerk, and now in a public office) had been either of them in town last Monday morn-

ing. For I had been twice before put to death by the London Papers, and once or twice severely wounded. And I therefore supposed some such rumours might arise from a really bad accident as had arisen before from nothing at all. I also had written to Brighton and to Edinburgh, where consequently the stupid hoax failed. In London it succeeded owing to A. E. and M. being unfortunately both out of town, and A. Montgomery, to whom I had also written, not chusing, I suppose, to open a letter from a dead man, for he must have had one from me on Monday morning, the day he says he got the forged one. It is very hard on Bob Shafto to suppose he wrote it. He says he never wrote a line to A. Montgomery in his life ! So they easily believed it to be his hand because they did not know whether it was or not. Kind regards to Lord Melville ; and believe me ever yours,

“H. BROUGHAM.”

My best

My dear Lady Mary

I am resolved to  
have the birth  
fratification of  
call you & your  
real name—  
Mary Thibbs

for you and I  
heart note - I  
do agree you  
that, tho' there  
is always the  
greatest pleasure  
in dis tinct  
purity, (or it  
is about all the

pleasure I now have  
in life.) I now  
felt it more  
strongly than upon  
this occasion -

It gives me a  
great pleasure,  
besides, to tell you  
that the Spirit  
of the Laureates

is very decidedly in  
favor of my  
proposal. I  
anticipate -

You are now  
secure of your  
promotion & I  
am, your lady -  
- she since bid  
H. B.



The Lady M. N. Johnston



Coming so immediately after the "judgment," even on the very day following it, such a bombshell as it was to the parties interested in the case—that letter from such a man naturally heightened the interest which the long-sustained discussion of the case had excited. The original holograph letter is still preserved in the Annandale Charter-chest. It was very much talked of in public for years after it was written, although it was never published. Exactly forty years after the date of the letter, when the peerage case was again revived by Sir Frederic Johnstone, the writer of these remarks inquired for it at the late Mr. Hope Johnstone. He searched for it at the time, and found that it had been mislaid. He promised to search further for it. But it was not till after his death in 1879, that his successors found it amongst his papers. A careful facsimile of the letter has been made from the original, and is here introduced. Neither the letter itself nor the envelope in which it is enclosed contain any mark of privacy or confidentiality, and after all the remarks which have been made as to the terms of the letter by the public, and the different course which the writer of it afterwards adopted, it seems as well for him and all others interested that the letter and envelope should be produced in facsimile.

Besides writing that letter to the sister of the claimant, who afterwards became the Honourable Mrs. Percy, as the wife of the Lord Bishop of Carlisle, Lord Brougham showed in other ways how strongly he felt the right and justice of the claim of Mr. Hope Johnstone to the earldom of Annandale. Among the auditors at the bar of the House of Lords who were listening to Lord Brougham's splendid speech on 15th May 1834, was Mr. Hope Johnstone himself. They had been in parliament together, and his lordship and Mr. Hope Johnstone's father, Admiral Sir William Johnstone Hope, were cordial friends. Admiral Hope had been member for the county of Dumfries for many years, and, in his speech, his lordship paid him a very high tribute of regard.<sup>1</sup> Lord Brougham asked Mr. Hope Johnstone at the bar, as he was to be a peer, if they had selected a member for the county of Dumfries in his place. His lordship also said to Mr. Hope Johnstone that he was to see the king that day, and would inform his Majesty that he had made out his claim to the earldom of Annandale. Mr. Hope Johnstone was at the king's levee either that afternoon or the following one, and when he was presented, his Majesty congratulated him on his being really Earl of Annandale on the authority of the Chancellor who had told him so.

<sup>1</sup> A tradition in the Annandale family is that King William the Fourth and Admiral Johnstone Hope were, when boys, as naval officers in the same ship together. They had a difference of opinion on some small matter, and waxed rather hot over it. Young Hope said to the young prince that if it was not for his

royal coat, he would have had it out with him in another form. The prince doffed his jacket, and the two had it out in pugilistic fashion. The further tradition is that the robust Hope was the victor. But it was probably a very small naval engagement after all.

INFLUENTIAL OPPOSITION OFFERED TO PROPOSED JUDGMENT OF  
LORD BROUGHAM.

About the same time Mrs. Hope Johnstone, wife of Mr. Hope Johnstone, was calling at the Marquis of Ailsa's. As she was leaving the house King William arrived on a call. His Majesty remarked to her that he must not name her Mrs. Hope Johnstone any more, as the Chancellor had just told him that her husband had made out his claim to be Earl of Annandale. So popular was Mr. Hope Johnstone, as proprietor of the Annandale estates, and such was the personal esteem for him in all the Borderland, that nothing seemed more fitting and natural than that the popular proprietor of Annandale should become the popular peer of Annandale. Great preparations, indeed, were made to celebrate such an auspicious event. The late Earl of Mansfield, who represented the Murrays of Cockpool in the county of Dumfries, was jealous of the Johnstones enjoying the title of Earl of Annandale, which had been previously held by two members of the Murray family before it became extinct in that line. He was a very active member of the Open Committee of Privileges before which the claim of Mr. Hope Johnstone was depending. Lord Mansfield could make no claim himself to the title of Annandale, as it was extinct in his family for want of male heirs. But a very highly influential member of the Committee, the late Duke of Buccleuch and Queensberry, K.G., informed the writer of these pages that Lord Mansfield, in impressing upon the Committee that the case was not ripe for judgment, and that Lord Brougham had erred in pronouncing such a favourable speech for Mr. Hope Johnstone, created an opinion in the minds of some members of the Committee to that effect.

Other influences were at work to assist Lord Mansfield in his opposition. Alexander, Duke of Hamilton, grandfather of the present duke, took alarm that if Lord Brougham's judgment was pronounced it would affect his own titles and estates, and he appears to have directed a personal threat to Lord Chancellor Brougham on the subject. To a report of this, which the late Miss Hope Johnstone had heard, the Honourable Mary Hope Johnstone refers in a letter which she sent to her. The letter is undated, but the post-mark on the envelope has the date October 5th, 1834. She says :—"What you say of the reported threat of the Duke of H[amilton] to the Chancellor may be true, but Lord Brougham in his situation *dare* not allow it to influence him in any legal transaction."<sup>1</sup> By these and other means Lord Brougham was induced not to pronounce his own opinion.

Lord Brougham's famous letter, here introduced in print and facsimile, could not fail to come up in after years. In a letter from the Honourable Mary Hope

<sup>1</sup> Original letter.

Johnstone to whom it was addressed, dated Frogmore Lodge, Windsor, 12th October 1838, Friday, to her niece, the late Miss Hope Johnstone, the writer gives very interesting pages of court news. She says :—"Her Majesty gave me leave to go to Adelaide Cottage as often as I liked, so I have been walking and sitting there. It is in great beauty, and quantities of flowers. Both dinners, besides the household, consisted of the Chancellor<sup>1</sup> (who, when he heard my name, BLUSHED !), *Conscience*, thought I, Lords Melbourne, Lansdowne, Palmerston, J. Russel, Glenelg, and Sir J. Hobhouse. Except Cottenham, who I only knew to bow to, they were all friends, and talking to them I really for the moment felt as if other days were not gone."<sup>2</sup>

## SECOND PERIOD.

From 15th May 1834, the date of Lord Brougham's favourable speech and congratulatory letter, to 11th June 1844, when judgment was given in favour of the construction being to heirs-male general in the four patents of peerage.

### LORD BROUGHAM CONSULTS TWO OF THE JUDGES OF THE COURT OF SESSION.

The favourable prospects which appeared to open up to Mr. Hope Johnstone by the attitude assumed by the Lord Chancellor in his speech of 15th May 1834 were not realised. Events occurred which rendered them as remote as ever. To these events reference will now be made.

When Lord Brougham proposed to delay the final decision of Mr. Hope Johnstone's

<sup>1</sup> Lord Brougham is here referred to retrospectively as Chancellor. His lordship resigned that high office on 22nd November 1834, and never returned to it. He was succeeded by Lord Cottenham, who was Chancellor in 1838, when the Honourable Mary Hope Johnstone wrote this letter.

<sup>2</sup> Original letter. There were later occasions when the Honourable Mary Hope Johnstone and Lord Brougham met. His lordship on these did not shew the same embarrassment. The following description is given of one of these by the former in another letter to her niece, dated Albemarle Street, Thursday evening, February 7th, 1839, in which she also makes allusion to one of Lord Brougham's eloquent speeches delivered in Parliament on 5th February :—

"Last night, to my great surprise, I found my-

self amongst 300 people at Cambridge House. The same people looking the same, and saying the same things, or rather nothings, they said in the same place last July ! . . . Lord Brougham's demonstrations of joy at seeing me, and his intense and particular whispers caused all eyes, Whig and Tory, to turn our way. And, indeed, I verily believe some of the ministers thought in contemplating the *Fire Brand* that I must somehow be the *gunpowder* that was to blow them all up. He was infinitely amusing, and has said he means to call on me!!!! His speech on Tuesday every body says was the most splendid piece of eloquence ever uttered, and *admirable* in matters, and feeling, and purpose, and delivered with a *lordly dignity* no one thought the man possessed or had a notion of. He means to speak most nights of importance, and Lady Wharcliffe has irons in the fire for herself and me to go the first good night we can. Lady Brougham as a neighbour has taken me up very kindly, and I hope to dine there when one sees the lord to most advantage." [Original letter.]

claim till a few days after the Whitsun recess, he gave as one of his reasons for the delay his desire to communicate with the heads of the law in Scotland. He took an early opportunity of following this unusual and questionable course by submitting his notes on the case to Lords Monereiff and Corehouse for their opinion regarding it. The opinion of Lord Monereiff, forwarded by him to Lord Brougham, was favourable to the claim of Mr. Hope Johnstone, but that of Lord Corehouse was very strongly adverse. The latter so influenced Lord Brougham as to lead him to postpone his proposed judgment in favour of Mr. Hope Johnstone.

The following letters will sufficiently show this. The first letter is from Lord Canterbury, formerly speaker of the House of Commons, to J. Irving, Esq. :—

“House of Lords, April 9th, 1835.

“MY DEAR IRVING,—I have been sitting here on appeals, and have seized the opportunity of talking to Lord Brougham about Hope Johnstone's case. He says the greatest possible difficulty exists. It must be decided somehow. Its decision the Scotch judges say, might, and probably would, raise great confusion in settled property, and he (Lord Brougham) sees no solution for the difficulties, but giving Hope Johnstone a British peerage as was done for the same reasons in a former case.

“This is not very intelligible, I submit, nor is it very definite, but it is all I have been able to get. . . .

“Ever your most faithful and sincere,

CANTERBURY.<sup>1</sup>

“J. Irving, Esq.”

In communicating the above letter to Mr. Hope Johnstone Mr. Irving says in his letter, “I understand that it is the opinion both of Lord Lyndhurst and Lord Brougham that your case won't be heard and decided without much further delay.” The following letter is from Mr. David Robertson, Parliamentary solicitor, to Mr. Hope Johnstone :—

“London, 24th July 1835.

“DEAR SIR,— . . . Dr. Lushington called for me to-day. He mentioned that he had seen Lord Brougham, who had explained to him the state of the Annandale peerage. Lord Brougham had sent his notes to Lord Monereiff, who had entirely concurred in opinion with him.

“The notes had also been sent to Lord Corehouse, but he had formed an opinion entirely opposed to the above, and he had stated that a decision upon the grounds urged in your favour would shake the titles to several estates in Scotland.

“This last opinion appears to have had weight with Lord Brougham to prevent him from moving the decision. He intimated that he should not be averse to a rehearing; but he said that perhaps the easiest way of getting out of the difficulty in this case would be by a creation of a peerage in your favour by his Majesty. In the situation in which you undoubtedly stood in regard to this family he did not think that such creation should be matter of difficulty. . . .

“I have the honour to be, dear sir, your very obedient and faithful servant,

DAVID ROBERTSON.<sup>2</sup>

“J. J. Hope Johnstone, Esq., M.P., etc., etc., etc.”

<sup>1</sup> Original letter in the Annandale Charter-chest.

<sup>2</sup> *Ibid.*

There were other influences at work besides what has now been related, which had the effect upon Lord Brougham to prevent him from moving his proposed decision in the Annandale case. The speech of his Lordship was so very remarkable that it could not fail to attract the attention of the number of claimants who were brought forth by the wide-spread advertisements ordered by the House of Lords in 1826. The proposed judgment of Lord Brougham was so entirely in favour of Mr. Hope Johnstone that a cabal was formed among parties who thought they had a claim to the Annandale peerages to stay the final judgment on the lines of the speech of the Chancellor. One step taken to delay judgment, however, was the lodging of petitions to postpone the final decision of the House of Lords on the claim of Mr. Hope Johnstone, and to be heard on their respective claims, by Sir Frederic George Johnstone and other three claimants. These petitions came before the Committee of Privileges at their meeting on 30th June 1834. The Johnstones of Westerhall had not prosecuted their claim actively since the first case was lodged for them in the year 1794. Sir Frederic George Johnstone now lodged a case restricted to the legal effects of the limitations in the four patents, reserving to a future occasion and an additional case the statement of his pedigree, and the proofs in support of it.

As already stated the Committee of Privileges met on 30th June 1834. At that meeting it was agreed to hear Mr. Follett and Sir Harris Nicolas on behalf of Sir Frederic George Johnstone, and Dr. Lushington on behalf of Mr. Hope Johnstone, and also the Attorney-General (Sir John Campbell) for the Crown. After hearing these speeches the Committee adjourned, *sine die*. They again met on 4th May 1838, when the minutes bear that counsel was heard on behalf of Mr. Hope Johnstone, one of the claimants, and the Committee adjourned till the 8th May 1838, when the minutes bear that counsel was heard on behalf of Sir Frederic Johnstone, and also the Attorney-General and the Lord Advocate on behalf of the Crown. Lord Cottenham was then Lord Chancellor, and Lord Brougham was absent on the Continent. An additional case for Sir Frederic George Johnstone was lodged in April 1838.

JUDGMENT OF LORD LYNDHURST THAT MR. HOPE JOHNSTONE HAD NOT MADE OUT  
HIS CLAIM TO THE PEERAGES, 1844.

The Annandale case did not again come before the Committee of Privileges until 14th May 1844. In 1839 a "further additional case" for Mr. Hope Johnstone was lodged. It was chiefly in reference to one of the bearings of the Huntly peerages on the Annandale case.

Sir Frederic George Johnstone was accidentally killed in May 1841, and on

13th April 1844 a case was prepared on behalf of his son, Sir Frederic John William Johnstone, then a minor.

In the same year, a further case was lodged for Dugald Campbell, Esq., M.D., another claimant of the Annandale titles as descended from Lady Mary Johnstone, daughter of James, Earl of Annandale and Hartfell, in 1661.

When the Committee met on 14th May 1844 Mr. Hope Johnstone put in various additional documentary proofs in support of his claim, including the warrant by King William the Third for creating the Marquisate of Annandale in 1701. The Committee of Privileges next met on 6th June 1844, when six counsel attended the Committee on behalf of different claimants. Mr. Cockburn and Mr. Bethel were heard to contend respectively that heirs-male in the patents must be construed as heirs-male of the body, and heirs-male general. The Committee met for the last time on 11th June 1844, when the Lord Advocate was heard on behalf of the Crown, and Mr. Kelly was heard in reply for Mr. Hope Johnstone. The Committee resolved that Mr. Hope Johnstone, Mr. Goodinge Johnstone, and Dr. Dugald Campbell had not made out their respective claims to the titles of Annandale and Hartfell.

The law lords who delivered their opinions on this occasion were Lord Chancellor Lyndhurst, Lord Brougham, Lord Cottenham, and Lord Campbell. They were unanimously of opinion that the limitation in the patents to heirs-male meant heirs-male general, and not heirs-male of the body. Lord Lyndhurst said that the question had been very elaborately argued on the present as well as on former occasions. But it appeared to him that it narrowed itself into the narrowest possible compass. He referred to the arguments which had been used in the course of the discussions that to construe the words heirs-male would let in all mankind up to Adam and Japhet. His Lordship said, "it is not true practically, and in the view of a Court of law, that the heirs-male general can never become extinct. The existence of an heir is a matter of proof—a matter of evidence. Heirs-male general have in many cases become extinct, even in great families, in the progress of time. All trace of them has been lost, and if, after diligent and cautious inquiry, no heir-male can be found, and there is sufficient ground to believe that no such heir can be discovered, this will let in the next limitation."<sup>1</sup> Lord Cottenham and Lord Campbell entirely agreed with the Lord Chancellor in the construction of heirs-male being to heirs-male general, but without making speeches.

#### LORD BROUGHAM'S RECANTATION.

Lord Brougham spoke at considerable length. He began by stating that he agreed entirely with Lord Lyndhurst. His Lordship then adverted to his speech on

<sup>1</sup> Printed Speeches, 11th June 1844, pp. 13, 14.



15th May 1834, in which he threw out an intimation very manifestly leaning in the opposite direction. He said that he felt it would be important after his former speech to call the attention of the parties and the "Court below" and the profession at large to this question, which could only be done by his public statement. He had since had private communication with the judges below. Lord Brougham further referred to the English law on the point. He said, in English law with respect to honours, "heirs-male" would be "heirs-male of the body." The presumption was that the sovereign meant to grant to heirs-male of the body, and they therefore construe in an English patent the term "heir-male" as meaning not "heir-male general," but "heir-male of the body," unless other circumstances show the contrary. Thus one of their lordships who was present, Lord Devon, he said, sits under that construction given to the original grant of the honour. In Scotland it was totally different; where the presumption was in favour of heirs-male general both as to lands and honours. Taking the whole matter together, adding also to this, that he had a communication with some most learned judges in the Court of Session on the subject, who were clearly of opinion that the contrary construction in a question of peerage would be of the utmost possible peril, and would shake the principles upon which the Courts of Scotland proceeded in respect of the titles of real property, he was of opinion that his former inclination was not supported or borne out by the whole case."<sup>1</sup>

Counsel for Mr. Hope Johnstone stated that he was not precluded by the resolution of the Committee from presenting a fresh petition, claiming upon the extinction of heirs [-male] general. The Lord Chancellor replied, "You have a right to come in by another petition." Counsel for Mr. Hope Johnstone said, "Precisely, my Lord. It may be that there are no heirs [-male] general, that the line is extinguished, however difficult we may have thought it."

The Lord Chancellor.—"Perhaps you may find it more easily now."<sup>2</sup>

### THIRD PERIOD.

From 11th June 1844 to 20th June and 20th July 1881, when final judgments were given against the respective claims of Sir Frederic Johnstone and Mr. Edward Johnstone.

#### APPLICATION BY MR. HOPE JOHNSTONE FOR RECONSIDERATION OF HIS CLAIM.

Notwithstanding the disappointment which was naturally felt by Mr. Hope Johnstone with the resolution of the Committee of Privileges on 11th June 1844, constru-

<sup>1</sup> Printed Speeches, 11th June 1844, pp. 15-17.

<sup>2</sup> *Ibid.*, p. 18.

ing heirs-male to mean heirs-male general, he lost no time in placing himself in the new position which it required. In less than a fortnight after the date of the resolution he presented a petition to the Queen. It set forth that all the sons of William, first Marquis of Annandale, died unmarried, including George, the third and last Marquis of Annandale, who died in 1792, and with whom the whole male issue of James, created Earl of Annandale and Hartfell, became extinct, as the other sons of Earl James also died without issue. There was thus no person entitled to succeed to the Annandale peerages under the first limitation of the patent of 1661. Under the second and third limitations of the patent and charter of 1661 and 1662 respectively, he was advised that he was now become entitled to the Annandale honours which these conferred.

After presenting that petition nothing more was done until August 1875, when Sir Frederic John William Johnstone of Westerhall presented a petition. The revival of the Westerhall claim brought forward other claimants in opposition to it, including among others Mr. Hope Johnstone and Mr. Edward Johnstone of Fulford Hall, Warwick, Barrister. The Committee of Privileges to whom these petitions were referred met on 30th May, and by adjournment on 21st and 24th July 1876, and on each of these dates the hearing of evidence, on behalf of Sir Frederic Johnstone, extended over long sederunts. In the meantime a discovery of great interest to Mr. Hope Johnstone had just been made which now falls to be noticed.

#### DISCOVERY OF LONG LOST RESIGNATION CHANGING THE LIMITATION OF THE ANNANDALE PEERAGES ON 14TH MAY 1657.

In all the discussions which took place before the Committee of Privileges it was invariably admitted by the successive counsel, Mr. Keay and Mr. Kelly, who appeared for Mr. Hope Johnstone, that no resignation of the honours and estates of Annandale preceded the patent of 1661 and Crown charter of 1662. It was assumed by Mr. Keay, as counsel for Mr. Hope Johnstone, in his speech before the Committee on 23d June 1825. In the Additional Case of Mr. Hope Johnstone, dated 1830, and subscribed by Messrs. Adam and Keay, it was plainly affirmed. In his Case of 1844, it was maintained, and it was again stated by Mr. Kelly in his speech at the bar.

Crown counsel who opposed the claim of Mr. Hope Johnstone readily availed themselves of these reiterated acknowledgments that there was no resignation of the dignities. Lord Advocate McNeill turned the admissions against Mr. Hope Johnstone with fatal effect in his speech of 11th June 1844. He too by reiteration emphasised

the admission which had been made, showing the importance he attached to it. His words are—

“I say that you will not look to the charter of 1662 of the lands, as construing the charter of honours of 1661. There was no resignation of the titles of honour; that is admitted in the printed Case. It is stated in the earliest Case for Mr. Hope Johnstone as quite clear, although the title of honour is to be controlled by the charter of the land, there was no resignation of that title. And I observe that my learned friend Mr. Kelly stated that the honours were not resigned.”<sup>1</sup>

If the noble and learned Lords who delivered opinions when judgment was given on 11th June 1844, did not expressly mention the non-existence of a resignation of the Annandale honours, all their reasoning proceeded upon the assumption that none had been made. Lord Chancellor Lyndhurst, Lord Brougham, his predecessor, and the other two law Lords who decided the case against the claim of Mr. Hope Johnstone at that date, as well as all the counsel engaged on the case at the time, both for the claimant and the Crown, were certainly ignorant of the fact now discovered that a formal resignation had actually been made by James, second Earl of Hartfell, of all his honours and estates on 19th June 1657 for a regrant of them to a series of heirs so clearly and distinctly stated that no doubt could exist regarding them.

#### ACCOUNT OF THE DISCOVERY OF THE BOND OF TAILZIE AND RESIGNATION.

It is time now to describe the discovery and relate the history of this admittedly important document. The discovery of it, which was made by the writer of these pages in the chambers of Messrs. Tait and Crichton, W.S., Edinburgh, may be best described from the evidence of Mr. Hew Crichton, a member of that firm, given before the Committee at the instance of Mr. Hope Johnstone.

Examined by the Solicitor-General, then counsel for Mr. Hope Johnstone, Mr. Crichton, after stating his different connections from the year 1813 with the firm which he represented, and that he had been a partner in it since 1828, said that the Marquis of Annandale was a client of the firm. His further statements are to the following effect :—The agency of the firm for the Annandale estates continued till 1816 or 1817, when, upon the succession of Lady Anne Hope Johnstone to these estates, it was transferred to Mr. James Hope, W.S., a relative of the family. At the transferance, all papers supposed to belong to the Annandale estates were, as believed by the firm, given over. Subsequent applications had been made at various times on behalf of the family with a view of ascertaining whether they still retained any papers of

<sup>1</sup> Shorthand writer's notes of speech of Lord Advocate McNeill, 11th June 1844, in the Annandale Charter-chest.

theirs, when it was invariably answered that they had given up all that was in their possession.

In the beginning of the present century, the same firm were agents for the late William, Duke of Queensberry.<sup>1</sup> In connection with that agency there was a very large quantity of documents in their custody. A great number of these were given up, but the whole of them were not handed over; as many as thirty or forty leather bags of papers remained. Their office had been at 2 Park Place since 1786, and they had left that place in May 1874, when the bags in question were taken to their present office. Mr. William Fraser, Edinburgh, had applied on behalf of the Duke of Buccleuch, in regard to the Queensberry estates, to examine the contents of the bags now mentioned, and received permission to do so. In making the search in Mr. Crichton's office he found two or three Annandale bags containing Annandale papers. The discovery, which was accidental, was made in January 1876 and by Mr. Fraser's researches. In one of the leather bags the original resignation and bond of entail of 1657 was found.

It was the purpose of his firm, Mr. Crichton said, to have destroyed all these bags under the impression that they contained documents of no importance. He delayed their destruction at Mr. Fraser's request on behalf of the Duke of Buccleuch.<sup>2</sup>

The resignation discovered in the manner described was at the time of discovery initialed by Mr. Crichton and his son, who was his partner in his business. The resignation was made by James, second Earl of Hartfell and Lord Johnstone. It was duly signed by the Earl 14th May 1657, and there is a minute of resignation in the Exchequer annexed of 19th June same year. The preamble of the resignation sets forth that it was made "speciallie for the weill of our famelie, honor and dignitie in our awin posteritie, and children of our awin bodie," and failing of these in the other heirs therein specified. The dignities resigned were those of the Earl of Hartfell, Lord Johnstone of Lochwood, Moffatdale, and Evandale. The heirs male and female of the resigner's body, and also of the bodies of his sisters who were married, are so distinctly stated that no doubt could arise in any mind in regard to the succession of any heirs called under the deed of resignation.<sup>3</sup>

#### THE BOND OF RESIGNATION KNOWN TO EXIST BY THE WESTERHALL FAMILY IN 1730 AND SUBSEQUENTLY.

There were other papers of interest, besides the bond of tailzie and resignation of 1657, found in the Annandale bags discovered with Messrs. Tait and Crichton. Some

<sup>1</sup> Popularly known in London Society as "Old Q."

<sup>2</sup> Minutes of Annandale Peerage Evidence, 1876, pp. 264-267.

<sup>3</sup> *Ibid.*, pp. 267-274.

of these may be appropriately noticed here. One of them is an Inventory dated 14th December 1730, entitled, "Inventory of the writes taken out of the Marquis of Annandale's closet att Craigiehall, by warrant of the Lords of Session dated the fifth of December 1730, to be transmitted to the process at the present Marquis' instance against the Lord Hope." One of the entries of this Inventory is as follows—"Item, Bond of Tailzie of the Earl of Hartfeild's estate, dated 14th May 1657." This entry, even with its imperfect description of the resignation, identifies it as an Annandale muniment. But another interesting fact elicited from the papers is, that Sir James Johnstone of Westerhall was present at Craigiehall on 14th December 1730, and superintended the selection of the papers contained in the above Inventory. The resignation of 1657 was thus in 1730 known to Sir James Johnstone. There is the further evidence gleaned from the papers discovered with Messrs. Tait and Crichton that he had recognised the importance of the document, as on 9th February 1731, he borrowed it from the clerk to the law-suit already mentioned. This appears from a receipt for it given by his clerk. How long the bond of entail and resignation remained with Sir James Johnstone cannot be determined. But he must have returned it prior to 16th May 1766, when Mr. John Tait, as agent for George, Marquis of Annandale, got up from the clerk to the law-suit the resignation and other writs, as appears from a contemporary copy of Mr. Tait's receipt found also in the same collection of Annandale papers. There are indications which will be afterwards alluded to, that Sir James Johnstone of Westerhall was collecting evidence between the dates last mentioned for asserting a claim to the Annandale peerage in certain eventualities. But in all the memorials and printed cases of the Westerhall family the fact of the existence of the resignation of 1657 is carefully suppressed.

The unexpected discovery in January 1876 of the resignation of the Annandale peerages and estates by James, second Earl of Hartfell, in 1657, while the case was being considered by the House of Lords, led to much discussion before the Committee of Privileges, both in printed cases and oral pleadings. But it is unnecessary to enter more particularly into the proceedings subsequent to that date further than to give a record of the various meetings and decisions of the Committee of Privileges, which will now be done.

#### THE COMMITTEE OF PRIVILEGES DECLINE TO GIVE EFFECT TO THE RESIGNATION OF 1657.

Meetings of the Committee of Privileges were held on 19th June and 26th July 1877, and also on 4th April 1878 and 29th and 30th May 1879, when additional evidence on behalf of Mr. Hope Johnstone and Sir Frederic Johnstone was presented, cases

lodged, and speeches delivered by the counsel for the claimants and also for the Crown. Judgment was pronounced, on the last of these dates, on the claim of Mr. Hope Johnstone to have the resolution of the Lords in 1844 altered in view of the discovery which had been made since then of the Resignation of 1657. Lord Chancellor Cairns and Lords Hatherley, Blackburn, and Gordon expressed their opinions, and the resolution of the Committee was:—That it was their opinion that no reason had been shown for departing from the resolution of the Committee of 11th June 1844, and order of the House thereon. In other words, the judgment of the Committee was that no effect should be given to the resignation of the Annandale peerages and estates in 1657. The Lord Advocate (Watson), as counsel for Mr. Hope Johnstone, put it to the Committee that the resolution just come to did not prejudice the claims of his client, except so far as the effect of the Resignation of 1657 was concerned, and Lord Redesdale, the chairman of the Committee, in answer said that the effect of the decision did not make a bar to any further proceedings which any claimant might be disposed to take.<sup>1</sup>

#### JUDGMENT AGAINST THE CLAIM OF MR. EDWARD JOHNSTONE, 20TH JUNE 1881.

After their refusal to give effect to the Resignation of 1657, the Committee of Privileges proceeded to dispose of the claims of Sir Frederic Johnstone and Mr. Edward Johnstone. On 22nd June 1880 the first of these completed production of his evidence; and on the same day, and on 28th and 30th June 1880 and on 30th May following, Mr. Birkbeck opened the case on behalf of Mr. Edward Johnstone and produced evidence for him. On the last of these dates additional evidence was also produced for Sir Frederic Johnstone and Mr. Hope Johnstone. On the following day and on 16th June Mr. Birkbeck summed up the case for his client. Mr. Fleming, for Sir Frederic Johnstone and Sir John Holker for Mr. Hope Johnstone were heard against the claim of Mr. Edward Johnstone, and Mr. Birkbeck was heard in reply.

<sup>1</sup> Minutes of Annandale Peerage Evidence, 1876-1881, pp. 427-792. Printed Speeches of 29th and 30th May 1879, p. 91. The discovery of the Resignation of 1657 after the statements of Mr. Keay in 1825 and Mr. Kelly in 1844, created considerable sensation amongst the claimants and in the legal profession, as it raised the question whether a resignation of peerages in the Court of Exchequer in Scotland in 1657, during the Commonwealth, would be accepted as valid. One eminent nobleman, who took an interest

in the subject when it was discussed in the House of Lords, of which he was a member, and who held at the time the high office of Commissioner to the General Assembly of the Church of Scotland, saluted the writer hereof at Holyrood, where he had the honour of waiting upon his lordship, when he returned from the discussion in London, with the remark, "You are a pretty fellow, Fraser, to try and make Oliver Cromwell one of the kings of England by an Annandale document."

The Lord Advocate (McLaren), for the Crown, said that he and the Attorney-General had arrived at the conclusion that Mr. Edward Johnstone had not made out his claim. He was informed that it was unnecessary to state the grounds upon which they had arrived at that conclusion. The Committee then passed the resolution that Mr. Edward Johnstone had not made out his claim.<sup>1</sup>

#### DISCUSSION UPON THE CLAIM OF SIR FREDERIC JOHNSTONE.

At several meetings of the Committee which followed upon the disposal of Mr. Edward Johnstone's claim, Sir Frederic Johnstone and Mr. Hope Johnstone gave in additional evidence. Thereafter Mr. Flening summed up the case of Sir Frederic; and Mr. Marten, on behalf of Mr. Hope Johnstone, was heard against the claim of Sir Frederic Johnstone.<sup>2</sup> In the course of Mr. Marten's speech the following important point arose.

#### THE WESTERHALL PEDIGREE OF 1776 REJECTED.

The subject under discussion was whether a pedigree of the Johnstones drawn up by the Westerhall family in 1776 was admissible as evidence in the peerage case, and what was the value of certain evidence given by living persons who had appeared in the case as witnesses for Sir Frederic Johnstone. What passed in the Committee of Privileges upon the first of these points has claim for special notice, as possessing a particular interest of its own.

There was no pedigree in the Annandale charter-chest that had been prepared prior to 1792, when the last Marquis of Annandale died. But Sir Frederic Johnstone produced from his own repositories this pedigree dated 1776, which stated that Matthew Johnstone, his ancestor, was a son of Adam Johnstone. The pedigree, in fact, if admitted by the committee, was the only evidence in support of the affiliation of Sir Frederic to Adam Johnstone, the ancestor of the Annandale family. It was stated by the committee that the pedigree was proper evidence such as they could receive, unless it could be proved that there was *lis mota* at the time when it was drawn up.

Mr. Marten, in his speech, was able to show conclusively that there was *lis mota* in 1776. His arguments were followed closely by the law lords, who questioned him at every step. Upon the authority of a case drawn up by a predecessor of Sir Frederic, in 1838, he showed that the Westerhalls had been collecting evidence for

<sup>1</sup> These proceedings occupied the committee during sederunts on 16th, 17th, and 20th June 1881. [Minutes of Annandale Peerage Evidence, 1881, pp. 1115-1120.]

<sup>2</sup> These proceedings extended over the

sederunts of the Committee on 11th, 18th, 19th, and 20th July 1881. [Minutes of Annandale Peerage Evidence, 1881, pp. 1121-1202.]

asserting their claim for the peerage from 1740 to 1770, and from 1773 to 1792, when Sir James Johnstone of Westerhall claimed the Annandale dignities. And upon the authority of a list produced from the Westerhall charter-chest of papers conveyed from Westerhall to Edinburgh in November 1787, he further showed that this pedigree was actually prepared by the Westerhall family for the purpose of their claim to these dignities. On these and other equally cogent grounds brought up by Mr. Marten, the Committee of Privileges decided that when the pedigree was drawn up in 1776 there was *lis mota*, and that the pedigree and a copy of it found in the muniments of Sir Harcourt Johnstone were not admissible in evidence.<sup>1</sup>

NON-EXISTENCE IN THE ANNANDALE REPOSITORIES OF A PEDIGREE  
PRIOR TO 1792.

At the outset of the speech of Mr. Marten, he was asked by the Lord Chancellor on the subject of there being no pedigree in the possession of the Johnstones of Annandale earlier than 1792 in the following manner:—

“*Lord Chancellor*—Let me ask a question. Is there no register of the pedigrees of great men in the College of Arms in Scotland, in the office of the Lord Lyon?

“*Mr. Marten*—I am informed, my Lord, by Mr. Fraser, a gentleman who is well informed on the subject, that all the documents in the College of Arms were burnt down to the period of 1672.

“*Lord Chancellor*—I daresay that is a very well known fact. Now, let me ask another question, a little connected with that. This pedigree which comes from the Westerhall charter-chest is to be considered; is there no pedigree of the Earls and Marquises of Hartfell and Annandale?

“*Mr. Marten*—None, my Lord.

“*Lord Chancellor*—Not in Mr. Hope Johnstone’s charter-chest?

“*Mr. Marten*—I am informed by Mr. Fraser that there is none before the year 1792, when the proceedings began.

“*Lord Chancellor*—And are such pedigrees as are subsequent to that date put before the house or not?

“*Mr. Marten*—They are not. Your Lordship may remember that I tendered in evidence a case which was laid before counsel (it was called a memorial), and your Lordship declined to receive it, on the ground that the proceedings had been commenced when it was drawn up.

“*Lord Chancellor*—Then of course we must not look at it; but what I rather wished to know was whether the state of the evidence before the house excludes the possibility of there being in Lord Hopetoun’s custody, or in the custody of your client, any pedigrees of the Johnstone family.

“*Mr. Marten*—I understand so, my Lord; there is nothing at all.

“*Lord Chancellor*—Because you see if there are any which are admissible in evidence they clearly ought to be produced.

“*Mr. Marten*—Yes; there are none whatever.

<sup>1</sup> Minutes of Proceedings in Annandale Peerage Claim, 20th July 1881, pp. 122-140.



"*Lord Chancellor*—Has any witness stated that they have been searched for, and that nothing of the kind can be found?

"*Mr. Marten*—I do not know that it is so stated in evidence, but Mr. Fraser is here present who has the custody of the Annandale charter-chest.

"*Lord Chancellor*—I have no doubt that Mr. Fraser knows as much as anybody about it; at the same time, if that evidence has not been given, it may be that when we have heard your argument we may desire to have evidence to satisfy us that there are no documents of that kind which could be produced, and which have not been produced.

"*Mr. Marten*—I am quite prepared to have that evidence given to your lordships at once. We can prove that searches have been made and without success.

"*Lord Chancellor*—It seems a singular thing that so important a family should have no pedigrees. However, it may be less singular in Scotland than in England. It is all the more unfortunate on account of the fire which you mention as having happened in the College of Arms.

"*Mr. Marten*—I am quite prepared to ask those questions of Mr. Fraser immediately if your lordships please.

"*Lord Chancellor*—No, not immediately.

"*Mr. Marten*—Then whenever your lordships think fit. . . ."<sup>1</sup>

#### A PEDIGREE OF THE ANNANDALE FAMILY TAKEN OUT OF THE ANNANDALE REPOSITORIES BY SIR WILLIAM JOHNSTONE OF WESTERHALL IN 1721.

The writer of these pages, alluded to in this quotation, was not asked by the Committee on this point, as the case was decided without reference to it. But in regard to the question of the existence of any earlier pedigree in the Annandale charter-chest than the year 1792 there are memoranda preserved in these repositories sufficiently accounting for the non-existence of such a pedigree. These are not without significance, and might have been produced before the Committee of Privileges if opportunity for doing so had been afforded. The memoranda in question are holograph of James, second Marquis of Annandale, and were written immediately after the death of his father, Marquis William, in 1721. They contain reflections made upon Sir William Johnstone of Westerhall, who acted as factor or commissioner for Marquis William, for appropriating papers from the Annandale repositories before and after they were sealed by the Sheriff's orders, according to Scottish usage, after the death of the Marquis. One of these is in the following terms—

*"That Sir William took out a tree of family before sealing papers."*

This memorandum, in the handwriting of James, second Marquis of Annandale, shows that there was a Johnstone pedigree in the Annandale repositories in 1721, and that this pedigree was appropriated by Sir William Johnstone of Westerhall. If this pedigree had been favourable to the claims of the Westerhall family the probability is that it would have been produced instead of the one that was drawn up in 1776.

<sup>1</sup> Minutes of Proceedings in Annandale Peerage Claims, 20th July 1881, pp. 120, 121.

## JUDGMENT AGAINST THE CLAIM OF SIR FREDERIC JOHNSTONE.

After Mr. Marten had concluded his speech, Mr. Fleming was heard in reply. The Lord Advocate M'Laren was then heard on behalf of the Crown, and expressed the opinion that Sir Frederic Johnstone had not made out his claim. Thereafter the Committee resolved that the claim of Sir Frederic Johnstone was not made out.

## IMPERFECT INVESTIGATIONS BY THE CLAIMANTS TO THE PEERAGES.

This closes the proceedings of a century of romance of the Annandale peerage. After all the extensive researches that have been made by the Westerhall and Annandale families, and by the other claimants, events which transpired in the course of the proceedings show how incomplete these researches often were. The discovery of the Resignation of 1657 is not the only evidence of this. The discovery of the warrant for the patent creating William, Earl of Annandale, Marquis of Annandale, dated 24th June 1701, is another instance of imperfect investigation. The warrant which had previously been overlooked by all the Westerhall claimants in their extensive searches for a century was, by the writer of these pages, discovered in the proper legal repository of the first Earl of Marchmont who received the warrant as his authority for appending the great seal to the patent. The Westerhall claimant objected to the reception of the warrant by the House of Lords in evidence at a meeting of the Committee of Privileges in 14th May 1844. The object in objecting to the warrant was that it was fatal to the contention of the Westerhall claimant, as it contained a limitation of the Marquisate to the heirs-male whatsoever succeeding to the Marquis in his lands and estate. As the Westerhall claimants are not in the entail of the Annandale estates, and have not succeeded to an acre of them, they could not be heirs to the Marquisate, even supposing they should establish their pedigree.

## ATTACKS UPON LAW LORDS BY DISAPPOINTED LITIGANTS AND OTHERS. MR. RIDDELL IN THE CASSILLIS, SUTHERLAND AND GLENCAIRN CASES.

Attacks upon law lords who have decided Peerage Cases in the House of Lords have not unfrequently been made by disappointed claimants to peerages and others. One noted instance of this is found in a work entitled "Inquiry into the law and practice in Scottish peerages before and after the Union," by the late Mr. John Riddell, Advocate,<sup>1</sup> who spent a long life in the study of Scottish antiquities, and especially of peerage law. Throughout his published work referred to, which extends

<sup>1</sup> His well-known work was published in 1842 in two volumes octavo.

to 1152 pages, Mr. Riddell vigorously attacks Lord Mansfield and Lord Loughborough, afterwards Earl of Rosslyn, the former of them in respect of his speeches in the *Cassillis* and *Sutherland Peerage Cases*, 1762 and 1771 respectively, and the latter in regard to his speech and judgment as Chancellor in the *Glencairn Peerage Case*, 1797. The objections stated by Mr. Riddell against these two eminent law lords, and their opinions in the *Scottish Peerage Cases* which have been named, will be ascertained by a reference to the index to his work. There Mr. Riddell, under the name of Lord Mansfield, writes as follows:—"His various errors, inadvertencies, crudities, devices, misconceptions and striking contradictions, etc., etc." Under the name of Rosslyn, or Loughborough, Lord, Mr. Riddell writes, in almost the same language, thus:—"His various defects, crudities, devices, misconceptions, contradictions, etc., etc." In each case the references to pages in the text are very numerous. No person can read Mr. Riddell's attacks upon these two noble lords without forming the conviction, from the pertinacity, incision and bitterness which mark them, that he has been actuated by a strong personal feeling against them as if they were his own enemies. But notwithstanding the vigour and vehemence of these attacks upon the opinions of Lords Mansfield and Loughborough, their judgments in the peerage cases referred to have not been reversed. They still remain the final and regulating decision of the highest court.

#### THE LATE EARL OF CRAWFORD AND BALCARRES IN THE MONTROSE CASE.

Another instance, this time of a disappointed litigant attacking the judgment of the House of Lords against his own peerage claim, is that of the late Earl of Crawford and Balcarres. Elated with his success as Earl of Balcarres in establishing his claim to the title of the older Earldom of Crawford, he listened to the advice of Mr. Riddell, who had been his counsel, and made a bold claim to the higher dignity of the Dukedom of Montrose, which was created by King James the Third in the year 1488, in favour of David, fifth Earl of Crawford. But although both the noble claimant and his eldest son, Lord Lindsay, were held in high personal regard by their fellow-peers, and great exertions were made to establish this claim, and a large number of counsel were engaged at much cost, it was a hopeless claim. The creation was made void by Act of Parliament, and afterwards restricted to a new grant of the title for the lifetime of the grantee only. Owing to the great exertions and cost incurred by the claimant, the case obtained a respectful hearing, and all the eminent law lords of the day, including Lord Chancellor Cranworth, Lords Brougham, St. Leonards, and Lyndhurst, were unanimous in holding that the claim had not been made out. The judgments of the Lord Chancellor and Lord St. Leonards were given at considerable length. During the hearing of the case, the Attorney-General, Sir Alexander Cockburn, afterwards Lord Chief Justice of England, made an

able speech against the claim. He could not avoid in his speech alluding pointedly to Mr. Riddell, who was one of the many counsel employed in the case by the Earl of Crawford. In his book on Peerage Law, already referred to, Mr. Riddell had expounded as a matter of history the Dukedom of Montrose, created in 1488 and rescinded by Act of Parliament in 1489 with a new grant for life only. This was so directly in opposition to what Mr. Riddell, in his printed cases, now represented, that the Attorney-General could not fail to turn it to account. After acknowledging Mr. Riddell's learning, he mentioned his book on Peerage Law as a work of authority, and appealed to it, saying, "I appeal from the counsel to the author, I appeal from the interested advocate to the disinterested historian."<sup>1</sup>

Mr. Riddell's client in that case was in reality Lord Lindsay, the eldest son and heir-apparent of the Earl of Crawford and Balcarres. His Lordship was an estimable nobleman, and the author of many interesting works, including the "*Lives of the Lindsays*," which is much esteemed as a model family history. Still he felt so aggrieved that his claim to a dukedom, which would have made him premier duke of Scotland, had been rejected, that he wrote a most elaborate report of the case, appealing directly by a letter to Her Majesty the Queen, prefixed to the report, in which he complained that the House of Lords had treated his case indifferently, and, indeed, had held it cheap. The Report, as it is called, of the whole cause, is a ponderous folio.<sup>2</sup> But no notice of it was taken in any form by Her Majesty, although it was so specially addressed to her. The work of Lord Lindsay eclipsed that of his legal adviser, Mr. Riddell, but his style was very different, and free from those personal attacks of the judges which characterised the work of Mr. Riddell, and which were generally acknowledged to have gone beyond the bounds of legal literature.

#### THE EARL OF CRAWFORD AND BALCARRES ON THE MAR PEERAGE.

Not content with writing the bulky volume addressed personally to the Queen on the rejection of his claim to the dukedom of Montrose, the Earl of Crawford, twenty-seven years later, or in 1882, again, this time in regard to the Mar peerage, made an attack upon the judgment of the eminent law lords who decided that celebrated case.

<sup>1</sup> Report of the Montrose claim by Lord Lindsay, p. 217. Mr. Riddell, who was present, winced under this scathing exposure of his contradictions, and he whispered to a friend who was standing beside him, "O, botheration take that book of mine, it is always coming up against me."

<sup>2</sup> A copy of that Report was presented by the author of the Report to the late Mr. John Hill Burton, the historian, who facetiously remarked to a friend that the book was so big that it had to be specially conveyed to him in a wheel-barrow.

His lordship had taken an interest in that case, and attended several meetings of the committee in the long years during which the claim was in dependence before the House of Lords. But his lordship was merely a patient and attentive listener. He never intervened with any remarks in the course of the lengthened speeches of counsel or of the law lords in pronouncing the final judgment. He appeared to acquiesce in the unanimous judgment in favour of the Earl of Kellie as the successor of John, Lord Erskine, first Earl of Mar, who was so created by Queen Mary on the occasion of her marriage with Darnley in 1565. Mr. Goodeve Erskine, who contested the claim of the Earl of Kellie, failed in his contention, and was a very disappointed litigant. Several of his friends sympathised with him, and regretted that the older earldom of Mar was treated by the Lords as extinct. Several noble lords, headed chiefly by the Earl of Galloway, after the decision of the House of Lords in favour of the Earl of Kellie, warmly espoused the cause of Mr. Goodeve Erskine before the House of Lords, with a view to finding redress for him. Lord Crawford, who had qualified himself for attacking a unanimous judgment of the House of Lords in his own Montrose case, made a similar attack upon the unanimous judgment of the law lords in the Mar case. His book, entitled "The Earldom of Mar in Sunshine and Shade during Five Hundred Years," consists of two octavo volumes extending in all to upwards of 1000 pages. It was published in 1882. The task was too much for his lordship, and he died on 13th December 1880, before the work was completed. The unfinished volumes, after the earl's death, were put into the hands of the late Mr. George Burnett, Lyon King of Arms, to complete for publication.<sup>1</sup> A copy of Lord Crawford's book was presented to Her Majesty, who referred it to her Prime Minister, Mr. Gladstone. He in turn referred the book to the Lord Chancellor, the Earl of Selborne. While at the bar his lordship was the leading counsel for Mr. Goodeve Erskine, and in various ways had shown a sympathetic feeling for his client. The unseemly protests manufactured in printed form by the friends of Mr. Goodeve Erskine, and the trouble which was created by repeated discussions of the case in the House of Lords, induced Lord Selborne to promote a bill for the restoration of "John Goodeve Erskine" to the earldom of Mar, with ranking in the Roll of the Peerage of Scotland next after the Earl of Sutherland. But the judgment in favour of the Earl of Kellie as Earl of Mar created by Queen Mary, was completely safeguarded in a special clause in the Restitution Act of 1885 in favour of Mr. Goodeve Erskine.

Lord Selborne and the other lords who promoted that Act of 1885 believed that it had terminated the controversy which had arisen about the Mar peerage. But in that

<sup>1</sup> Mr. Burnett had been one of the active promoters of the claim of Mr. Goodeve Erskine, and prematurely in his official capacity recognised him as Earl of Mar.

they were disappointed. Lord Galloway and his friends still continued their protests, and agitated both in the House of Lords and at the election of Scottish peers at Holyrood against the judgment of the Lords recognising the Earl of Kellie as Earl of Mar.

In one of the great debates in the House of Lords upon this subject, raised by Lord Galloway, the Earl of Selborne made a masterly and exhaustive speech for maintaining the judgment of the House of Lords in favour of the Earl of Kellie as Earl of Mar. That speech was so damaging to the protracted agitation by Lord Galloway that the protesters were never able to answer it, although they continued their agitation in the spirit of Lord Crawford's Mar Book. Subsequently Lord Galloway and a number of his friends wrote to the Lord Chancellor, Lord Halsbury, asking his advice what to do to further their ends. His Lordship called Lord Galloway and the other Lords before him in the House of Lords, and complained of their irregular course of proceeding. The opposition has since then died out. For the first time at an election of peers at Holyrood there was, at the election of 1894, no protest tendered by Lord Galloway or any other peer relative to the Mar Peerage. The unanimous judgment of the House of Lords in favour of the Earl of Kellie as Earl of Mar has been amply sustained notwithstanding the long ordeal through which it passed by the "persecutions," as Lord Selborne styled them, of the Earl of Galloway and the other disappointed peers who followed his lead.

#### THE JOHNSTONES OF ANNANDALE AND THE DECISION AGAINST THEIR CLAIMS.

Nothing could be further from the wish of the present representative of the Annandale family or of the writer of this narrative than to follow these several examples here in regard to the judgments of the House of Lords upon the claims made to the Annandale peerages since 1792, or to those who saw it their duty to pronounce them. While still avoiding this course therefore as much as has hitherto been done, it is only proper in closing the narrative to offer some remarks explanatory and vindictory of the part taken by Mr. Hope Johnstone and his predecessors in this celebrated peerage contest.

#### THE FAMILY JUSTIFIED IN MAKING THESE CLAIMS.

The judgments which the House of Lords have passed upon these claims of the Johnstones of Annandale have invariably respected the construction of the limitation in the patent of 13th February 1661. The limitation in question confers the Annandale peerages, in the first place, upon the "heirs male" of the patentee. The construction of that term, upon which all the contentions of the Annandale family have uniformly rested, is that, in this particular patent, it means heirs male of the body. It has been

seen that the House of Lords have rejected this construction, and have construed the term to mean heirs male whatsoever, leaving it open to Mr. Hope Johnstone still to seek the peerages under an amended claim.

While the claim to the peerages made by the Annandale family and the particular construction of the disputed limitation, upon which that claim was made to rest, have not thus far been upheld by the supreme tribunal of the country, yet, there can be no ground, on this account, for holding that the family were without justification in bringing their claim and the limited construction of the terms in the patent of 1661 upon which it rested to the test of law. There are such particulars as the support given to their claim by so many eminent counsel employed by the family, the admitted flexibility of the term in the patent, and the hesitancy which the Lords so long displayed in deciding upon the construction of the terms. There are also the further particulars of the judgment which was proposed by Lord Brougham in favour of the limited construction of "heirs-male" and of the claim of Mr. Hope Johnstone, and the vacillation and change of opinion of such legal luminaries as Lord Redesdale and Lord Brougham. All these, when viewed singly, and especially in combination, demonstrate that the Annandale family were not without reasonable ground for confidently expecting a judgment in their favour, or at least that they were not chargeable with presumption in entertaining that confidence.

#### THE VALUE OF CONTEMPORANEOUS EVIDENCE.

The weight of contemporaneous evidence in favour of a limited rather than an extended construction being put upon the limitation in the patent of 1661 is considerable. In the Montrose case, to which reference has already been made, the Lords who decided it acknowledged the importance of such evidence and the influence it had upon them in coming to a decision in that case. In his speech when pronouncing judgment on 5th August 1853, Lord Chancellor Cranworth, speaking of the effect of the Act Rescissory of October 1488 upon the Montrose patent of May of the same year, said: "Undoubtedly the principle has been often acted upon, and not unwisely or improperly, that matters of this sort, being in very great obscurity, may sometimes be elucidated by what has been called *contemporanea expositio*—seeing how they were understood at the time."<sup>1</sup> After referring to such evidence at considerable length, his Lordship added the words: "It appears to me, therefore, my Lords, that all these documents afford the most irresistible contemporaneous evidence that the Act Rescissory was then understood to have the effect which I propose now to ask your Lordships to attribute to it."<sup>2</sup> In summing up the case at the close of his speech, and immediately

<sup>1</sup> Report of the Montrose Claim by Lord Lindsay, p. 315.

<sup>2</sup> *Ibid.* p. 326.

before moving the resolution containing the judgment of the House, Lord Crauworth, insisting again that the Act Rescissory annihilated the Montrose dignities claimed by Lord Crawford, said : "All contemporaneous usage shews that it was so understood. Everything that has been done since has been done upon the assumption and upon the footing of these having been annihilated. Three centuries and a half have elapsed without any claim to this Dukedom being made, which is at least a strong argument to shew that there was some reason why the claim has not sooner been made ; and for the reasons I have stated I am of opinion that this claim has not been made out." <sup>1</sup>

Lord St. Leonards, who followed the Lord Chancellor with a speech, alluding to the point of the regraut of the Dukedom of Montrose being only for life, said : "But even supposing there were a question about it, contemporaneous usage, as my noble and learned friend said, must guide and always has guided in these cases, particularly if you are called upon to supply certain words in an ancient grant which are not found there." <sup>2</sup> The Montrose claim was in short decided upon contemporaneous evidence.

#### CONTEMPORANEOUS EVIDENCE BEARING ON THE LIMITATIONS OF THE ANNANDALE PATENT OF 1661.

As has been stated, contemporary evidence bearing upon this subject is forthcoming. The peculiar circumstances of the family of James, Earl of Annandale and Hartfell, in 1661, when the patent of peerage was granted to him, constitute very important contemporary evidence upon the subject. These circumstances were not sufficiently attended to, nor indeed recognised, during the progress of the case. No one can read the second chapter of the Memoir of the first Earl of Annandale, printed in the first volume of this work, without arriving at the conviction of their great importance in this connection. That chapter has not been embodied in this narrative, in order to avoid repetition, but it ought to be read along with it.

There are two parties to the patent of honour in question. There is the grantee or recipient of it and the granter of it. The strong desire of the first of these and the manifest intention of the last of them in regard to the limitation of the patent are conclusively brought out in the chapter. A summary of what it contains may be here introduced.

#### THE ORDER OF SUCCESSION DESIRED BY THE GRANTEE OF THE PATENT OF 1661.

From an early period of his life, James, earl of Annandale and Hartfell, showed himself to be possessed of a dominating desire to have his honours and estates

<sup>1</sup> Report of the Montrose Claim by Lord Lindsay, p. 343.

<sup>2</sup> *Ibid.* p. 357.



inherited by heirs of his body. To secure such heirs he contracted marriage in 1645 when a minor. During the first six years there was no issue of the marriage, but by 1655, or ten years after the marriage, two daughters were successively born to him. As he had no sons by this time, and lest his estates should come to be possessed by collateral heirs-male, the heirs of entail ranking next to the heirs-male of his body, the earl made a bond, disposition and entail, on 15th February 1655, rescinding former entails, and making new provisions and a new entail. This new entail secured, that failing heirs-male of his body, his earldom was to be inherited by the heirs-female of his body. The earl also obliged himself never to make any new entail or disposition of his estates, failing heirs-male of his body, to the prejudice of his daughters. This is strong contemporaneous evidence of the earl's desire so far as the succession to his estates is concerned.

Similar evidence also exists of the desire entertained by the earl in regard to the succession to his dignities at this time. On 18th January 1657, a third daughter was born to him. A month or two previously his only brother died without issue. The circumstances of the earl at this juncture in regard to male heirs is most striking. He had three daughters, no sons, no brothers, no uncles, and no known male relative direct or collateral. He had, however, two sisters and their male and female children. In these circumstances the earl, on 14th May 1657, made resignation of his estates and peerages for a regrant in favour of himself and the heirs-male of his body; whom failing, to the heirs-female of his body; whom failing, to his sisters and the heirs of their bodies. This resignation bears to be made by the earl for the weal and standing of his family, honour, and dignity, in his own posterity and children of his body, and failing them, of the other heirs of entail therein specified. There were other deeds of settlement which the earl made at this time, on the same lines as those now named.<sup>1</sup> No clearer or more convincing contemporaneous evidence could possibly exist of the intense desire in reference to the succession to his peerages and estates which animated the earl at this time. The fact of the resignation of 1657 being made in the hands of Cromwell's exchequer might and has affected the legality of the deed as a valid resignation, but it can never take away the force of its testimony of what the desire of the earl was at that important juncture. And while the House of Lords has refused to give effect to it as a resignation, it is difficult to see how they can reject the evidence which it gives upon this point as a "declaration plain" upon the part of the earl.

The crown charter of 1662 is also contemporaneous evidence of the desire of the earl. That charter is not confined to the lands. The destination of these is accompanied with the "style, title and dignity of Earl of Annandale," which shows that the

<sup>1</sup> Volume i. of this Work, p. ccxxviii.

title and estates were to go to the same heirs, and the limitations comprise heirs-male of the body, heirs-female of the body, and heirs-male general, in succession, the order of succession stated in the resignation of 1657 of the estates and dignities of the earl.

This charter and its limitations prove that in 1662, the year following the date of the patent of peerage, the Earl's desire as to the destination of his honours and estates, was entirely the same as to his daughters succeeding the heirs-male of his body as it had been five years previous when he resigned these in 1657.

#### THE ORDER OF SUCCESSION INTENDED BY THE GRANTER OF THE PATENT OF 1661.

The other party to the patent of 1661 besides the grantee was King Charles the Second, the granter of it. Contemporaneous evidence of his intention is obtained from his whole conduct to the earl at this time, and especially from the patent itself, and the terms which the king employs in it. These manifestly show that the earl was in great favour with the king, that the king was grateful to him on account of his services, and his sufferings in the king's cause, that His Majesty was determined to reward the earl for these, and that he intended to do so in such a way as would gratify and please him. The strong and cherished desire of the earl has been sufficiently shown, and there was nothing that the king could do for him that would so much reward, and gratify, and please the earl as to concede to him that desire. It is difficult to imagine that the king crossed the wish of one for whom he had this favour so much as to bring in heirs-male general before the heirs-female of the body. The earl had a son born to him on 17th December 1660, nearly two months previous to the granting of the patent, which was on 13th February 1661. In the patent, the king re-granted the old peerages of 1633 and 1643, resigned by the earl in 1657. He also gave him a grant of three new peerages, with extended limitations to include the heirs-female of his body. The limitations of the patents of 1633 and 1643 excluded these heirs-female. If, however, in the patent of 1661, heirs-male whatsoever were made to rank before heirs-female of the body, it was a practical exclusion of the latter.

The crown charter of 1662, which has been referred to already, is further corroboration of the king's intention to gratify and please the Earl of Annandale at this time. As in the case of the patent, it contains many expressions of gratitude and favour to the earl. It also conferred upon him the earldom of Annandale, with its boundless baronies and lordships, appointed him lord of the regality of Moffat, steward of the Stewartry of Annandale, and hereditary keeper of the Castle of Lochmaben. The limitations of this charter are those contained in the resignation of 1657. The docquet at the end of the warrant, which is under the king's sign-manual and upon which the

charter proceeded, bears that it contains the gift of the king to the earl of the lands, lordships, and others therein specified, "with the dignity of an Earl."

The intention of King Charles to gratify and please the earl is, however, still further borne out, when, on 23rd December 1669, with the advice and consent of Parliament, he, by an Act of Parliament, ratified and approved the charter of 1662 with its limitations to the heirs-male of the body, whom failing the heirs-female of the body, and other heirs therein stated, and grant of the earldom of Annandale, "with the title, style, and dignity of Earl thereof." Besides bringing out the disposition of the king to favour the earl, this Act of Parliament, and the charter which it ratifies, shows that it was on all hands understood at the time that the landed earldom and the title of Annandale were to go together to the same series of heirs—that given in the charter.

The acts of royal favour shown to the Earl of Annandale by the king now recited, amount to "a declaration plain" of his intention not to decline, but to concede, any request made by the earl. To have brought in the heirs-female of his body and their offspring, for whose succession to him in his dignities and estates, failing heirs-male of his body, he was so very deeply solicitous, not after the heirs-male of his body, but after the remotest male posterity of his remotest male ancestor, would have been a mockery of his cherished wishes and the opposite of pleasing to him.

#### LORD BROUGHAM ON THE ANNANDALE PEERAGES, ON 15TH MAY 1834 AND 11TH JUNE 1844.

The course adopted by Lord Brougham as Chancellor, on the first of these dates, in delaying judgment, and calling upon counsel for the claimant to answer the speech of counsel for the Crown, as his Lordship himself admitted, was a most unusual one.<sup>1</sup>

But this was not the only unusual proceeding adopted by Lord Brougham on that occasion. After proving to a demonstration in his speech the construction of the limita-

<sup>1</sup> The course referred to was the best method that occurred to his Lordship to get out of a dilemma. He intended his speech at first to be a final judgment in favour of Mr. Hope Johnstone, there being at the time a concurrence of opinion in the Committee of Privileges in favour of his claim. The imprudence of Lord Brougham, however, caused the tenor of his proposed judgment to become known beforehand. This gave time to Lord

Mansfield, who took alarm, to canvass members of the Committee, with the result that, at the last moment, Lord Brougham found it necessary to change the intended judgment into a speech of balancing the arguments on both sides, but still with a manifest leaning to Mr. Hope Johnstone, and probably with the expectation of ultimately deciding in his favour.

tions in the patent of 1661, contended for by the claimant to be the accurate one, and after employing the strongest and most forcible language in support of that construction and against any other one, and making his speech to be one entirely for the claimant, Lord Brougham referred the case and his proposed "Judgment" upon it to two judges of the Court of Session. Such a proceeding was unprecedented and irregular, and led to consequences disastrous to the claim of Mr. Hope Johnstone.

Speaking of the construction of the limitations in question, to which his speech was entirely confined, and upon which in his Lordship's view the case turned, Lord Brougham pointed out the necessity of construing "heirs-male" to mean in this patent heirs-male of the body, in order to avoid giving the limitations "an uncouth aspect and anomalous character," and to make them "intelligible and rational." He supported that construction by applying "the soundest rules of construction," and by stating that the opposite construction made the limitations "wear so unusual and, indeed, so absurd an aspect." He laid down "as a proposition which can admit of no doubt, that if there is one intention more clearly expressed than another, if there is one purpose more certainly defined than another, and meant to be more precisely fulfilled in this charter, it is that the limitation should have effect which carries the honours in a certain event to heirs-female." He then added, "The question is, in what event? and that is the whole question." Lord Brougham, weighing the arguments which had been produced on both sides upon this point, answers the question. He says, if the limitation is construed to mean heirs-male whatsoever, then all that was written in the patent about heirs-female "is waste paper," and the limitation bringing in that class of heirs "never can by possibility be made available to any human being while the grass grows or the rain falls, because no man can prove the extinction by legal evidence of all persons who may by possibility connect themselves with James, Earl of Hartfell, the first patentee, through males only." It is unnecessary to quote more of the many strong expressions of a like kind made use of by Lord Brougham in enforcing his "present impression," which he said was "undoubtedly in favour of this claim."

Instead of giving a judgment in terms of the conclusions to which he had come, Lord Brougham asked the Committee of Privileges for time "for further consideration of the whole subject, and for communication with the heads of the Law in Scotland," or with "the Court below," as he phrases it in 1844. As has been shown in the earlier pages of this narrative, Lord Brougham did not open communication with "the heads of the Law in Scotland," but with Lords Moncreiff and Corehouse, two Ordinary Lords of Session. The Lord Justice-Clerk in 1834 was David Boyle, and the Lord President of the Court of Session was at that date the Right Hon. Charles

Hope of Granton. But neither of these were consulted by his lordship. The two judges who advised him not only were not the supreme heads of the Court of Session, but in no sense were they either "the Court below." Neither of their lordships had heard the whole evidence and pleadings, and they were therefore incompetent to advise upon the proposed judgment of Lord Brougham. They were not unanimous in the advice which they gave. This important fact his lordship is careful not to mention. Lord Moncreiff, who had heard part of the evidence in an earlier stage of the claim,<sup>1</sup> gave an opinion which was entirely in favour of a judgment for Mr. Hope Johnstone. Lord Corehouse, who had never heard the case, or been connected with it in any way, took the opposite side, and gave an opinion against such a judgment. All this is brought out in the correspondence upon the subject in the previous part of this narrative.

In 1844, when advocating an extended construction of the limitations of the patent of 1661, in opposition to his views in 1834, Lord Brougham says,—“I had a communication with some most learned judges of the Court of Session upon the subject, who were of opinion that the contrary construction in a question of peerage would be of the utmost possible peril, and would shake the principles upon which the Courts of Scotland proceed in respect of the titles of real property.” In the same speech he says again,—“My communication with the Scotch judges was had immediately after the argument before the Whitsun recess, and I then found that the opinions I had taken of those very learned persons, Lord Corehouse<sup>2</sup> and others, put a stop to all chance of its being immediately decided.” Lord Brougham refrains from mentioning Lord Moncreiff.

<sup>1</sup> His lordship before he succeeded to his baronetcy in August 1827, and before he was elevated to the Scottish Bench in 1829, as Mr. James Wellwood Moncreiff, acted as counsel for Mr. Hope Johnstone for a very brief period, and was present at the Committee of Privileges, and heard the evidence produced at the single sederunt of 28th April 1825.

<sup>2</sup> It is probable that it was the case of the Duke of Hamilton to which Lord Corehouse referred as being a precedent against the proposed judgment of Lord Brougham. But the truth is, the Duke of Hamilton holds the title and estates of Hamilton, although he is neither heir-male nor heir-female of the Hamilton family, but merely heir of provision under

a particular entail. The heir-male of the Hamilton family is the Duke of Abercorn and Marquis of Hamilton, K.G., while the Earl of Derby is the heir of line or heir-general of the Hamilton family. The late Earl of Derby, on 15th November 1859, wrote to the writer of these pages that some years ago Mr. John Riddell investigated his father's claims, "and though the result was to satisfy me that I might successfully claim some of the titles, I did not see any sufficient inducement to do so." [Original Letter *pencs* the writer hereof.] The popular tradition on the subject is that Lord Derby might claim the title of Earl of Arran, but not the island of Arran, and that he did not care for the title without the island.

whose opinion coincided with that of Lord Brougham as first entertained. He mentions Lord Corehouse as he makes use of his opinion. Yet he leaves the reader of his speech to infer that he only got one opinion from the judges he consulted. He does so at least in the first of these quotations. He also conveys the impression that he was giving the prevailing opinion of the judges in the Court of Session, whereas there is ground to believe that there was greater unanimity in opinion among them for a limited construction of the limitations of the patent of 1661.<sup>1</sup> In his speech in 1844, Lord Brougham coincided with the judgment of Lord Lyndhurst, then Lord Chancellor, against the claim of Mr. Hope Johnstone, and accounted for his change of opinion since 1834, by stating that he had been influenced by his communications with the judges in the Court of Session. The unusual course taken by Lord Brougham led to great injustice to Mr. Hope Johnstone. At the same time, it must be admitted that his speech in 1834 is a masterly and exhaustive statement of the case of Mr. Hope Johnstone, the force and conclusiveness of which no argument can set aside.

#### OBSERVATIONS ON LORD CHANCELLOR LYNDHURST'S JUDGMENT ON 11TH JUNE 1844.

In 1826, when the Annandale peerage case was before the Committee of Privileges, Lord Lyndhurst, who was then Sir John Singleton Copley, in his official character as Attorney-General, acted as counsel for the Crown in the case, and pleaded as such against the claim of Mr. Hope Johnstone. His speech delivered on 9th March of that year, and his speech as Lord Chancellor in giving judgment on the claim of Mr. Hope Johnstone in 1844, are in striking contrast the one with the other. The speech in 1826 extends to sixty folio pages of ms.<sup>2</sup> The one in 1844 only covers little more than two folio pages of print. The case which in his first speech must

<sup>1</sup> The Right Hon. Charles Hope, Lord President of the Court of Session, in notes by him on the claim for the earldom of Annandale, written in 1830, and preserved in the Annandale Charter-chest, states his persuasion that the judges of the Court of Session would be unanimous upon this point.

<sup>2</sup> The speeches for the Crown in 1826, of Sir William Rae, Lord Advocate, and Sir John Copley as Attorney-General, extended over two sederunts of the Committee of Privileges. The Lord Advocate's speech

begun on 6th March was continued on 9th March, and comprised in all seventy-seven folio pages of ms. The Attorney-General's speech was given when the Lord Advocate was finished, and, as stated above, was not much shorter than that of Sir William Rae. Mr. Adam's reply to Crown counsel given on 13th March extended to eighty-seven folio pages of ms., while the speeches of Lords Redesdale and Eldon on 22d May following, are contained in twenty-two folio pages of ms.

have assumed considerable dimensions to him, in his last shrunk to be one which resolved itself "into the narrowest possible compass."

Only one reference need be made to the speech of 1826. In that speech he endeavours to make a strong point of the allegation which he made that the patent of 1661 was drawn up by a crown official accustomed to such work, and who would therefore be most accurate in the phrases which he employed. But as his allegation was a mistake, his whole argument falls to the ground. His words are—

"I cannot suppose that when the first limitation was to *Comitem de Hartfell ejusque heredes masculos* that that was done incautiously, that it was done without consideration, but I must assume that it was done deliberately, the person drawing the instrument knowing at the time what the nature of this limitation was. Your lordships will recollect this is a grant by the Crown, prepared by persons accustomed to prepare instruments of this kind, knowing the full force of the terms they made use of. Can your lordships suppose, therefore, that persons of that description, preparing an instrument of this kind with that caution which is always exercised in preparing instruments of this nature, knowing the full force of the terms they were using, having the former patent of the Earl of Annandale before them, that they should incautiously omit the words '*ex corpore*,' while at the same time they meant 'heirs-male of the body'? Not having so expressed itself in the instrument itself, it is impossible that your lordships can come to that conclusion."

Under the second limitation of the patent of 1661, he speaks in similar terms to what he has now been quoted as saying under the first. He proceeds thus:—"The party who drew this instrument knew very well the effect of the words he was using:" and again—

"The limitation being drawn by a person acquainted with his business from his situation, he meant fairly to discharge his duty, and that he must intentionally have omitted the words '*ex corpore*,' and have made use of the terms heirs-male as indicating the intention of the grantor that the estate and title should pass to the heirs-male general."<sup>1</sup>

There is no proof that the person who drew up the patent of 1661 was accustomed to prepare such instruments, and that he answered to the description here given of him. The person who prepared this particular patent was Andrew Martein,<sup>2</sup> the Earl of Annandale's own legal adviser, and the presumption is that this was the first and last patent of the kind that he ever prepared. The gratuitous assumption of Lord Lyndhurst is thus disproved by existing contemporaneous evidence.

In his short speech of 1844, Lord Lyndhurst differed from the lords who preceded him in the Annandale case on the subject of the extinction of heirs-male general.

<sup>1</sup> Copy Speech in MS. in Annandale Charter-chest.

<sup>2</sup> Vol. i. of this work, p. ccxxxii.

Lords Eldon, Redesdale, Brougham, and others, held that before a new series of heirs could succeed upon the failure of heirs-male general, it was necessary to prove the extinction of all male heirs up to Japhet or Adam. Lord Brougham says—

“While on the one hand there is no end of the claims that may be brought forward by some one springing up who may be able to connect himself by males only with the patentee, so also, on the other hand, the possibility of proving extinction is not to be contemplated; indeed you can never at any one time prove by legal evidence that there is a complete extinction of the general male succession by the failure of heirs-male whatsoever: heirs-male of the body may fail, heirs-female of the body may fail, but that heirs-male whatsoever should fail, seems hardly within the scope of possibility. But, at all events, it is quite out of the scope of possibility in every case that you should succeed in proving the failure of that destination, namely, of heirs-male whatsoever. Therefore, I can hardly conceive a more hopeless task being imposed upon any party, than having to claim upon the failure of heirs-male general, or whatsoever.”

In contrast with all this Lord Lyndhurst saw no difficulty in the case at all. He held that it was “a matter of proof—a matter of evidence.” Lord Brougham said, “The possibility of proving extinction is not to be contemplated.” Lord Lyndhurst now said, “If after diligent and cautious inquiry no heir-male can be found, and there is sufficient ground to believe that no such heir can be discovered, this will let in the next limitation.”

In both of his speeches, the one in 1826 and the other in 1844, Lord Lyndhurst made the limitations of the patents of 1633 and 1643 to rule the limitations in the patent of 1661, and because the two former set out with a limitation to heirs-male general, he considered that the other one of 1661 must do the same, and he construed it accordingly. But his lordship had to acknowledge that while the two former had no provision for heirs-female, the third one had, and he confessed that this was a “material circumstance,” although he did not give effect to it.

The two Chancellors before whom the Annandale claims were heard in 1834 and 1844 respectively, were rivals. They were both distinguished peers and great orators. But they differed in important points. Lord Brougham had the natural gift of quickly arriving at accurate conclusions on a case brought before him for trial. Even Lord Lyndhurst admitted this. While he was of opinion that without labour and reading Lord Brougham could not administer justice, he granted that “his great acuteness and rapid perception may often enable him at once to see the merits of a case, and hit upon the important points.” Lord Lyndhurst, on the other hand, with all his intellectual powers, did not take this ready and almost intuitive grasp of the merits of his subject. He arrived at his conclusions by a slower method. But they were not always more sure and accurate on that account. There is a well-known lawsuit, the



decision in which indicates that Lord Lyndhurst's judgments were occasionally unreliable. The case of *Small v. Attwood*<sup>1</sup> was in some respects one of the greatest ever tried in England. It fell to Lord Lyndhurst, as Chief Baron of Exchequer, to try the case. After hearing it he took nearly a year to deliberate upon it. But his judgment, which was delivered on 1st November 1832, when appealed against, was reversed in the House of Lords by the law lords who were his juniors.

Another important difference between the rival Chancellors, and one which detracts from the value of the judgment in the Annandale case in 1844, may also be pointed out. Lord Brougham was originally a Scotch advocate, and was trained in Scotch law and had practice in it. He was thus competent to deal with a Scotch case like that of Annandale. Lord Lyndhurst, on the contrary, was entirely unacquainted with Scotch law. He was called to the English Bar, and he had uniformly declined briefs in Scotch appeals. Lord Campbell, in his *Life of Lord Lyndhurst*, says of him, "that for him to have attempted to speak *ex cathedra* on the Scotch tenure '*a me vel de me*,' would only have exposed him to ridicule."<sup>2</sup> When he became Chancellor in 1827, Lord Lyndhurst had to adopt the unusual course of obtaining a commission from the House of Lords to Sir William Alexander, Chief Baron, who had a thorough knowledge of Scotch law, and to Sir John Leach, Master of the Rolls, to dispose of Scotch appeals to the House of Lords.<sup>3</sup> This was a violation of the rule that only peers could sit as judges in such cases. The Annandale case was one requiring the application of the principles of Scotch law. The case turned upon the interpretation to be given to the term "heirs-male" in the limitation of the patent of peerage of 1661; and although, as has been seen, the term is a flexible one, the ordinary meaning given to it in England is entirely different from that attached to it in Scotland. Those lords who had most acquaintance with Scotch law found such difficulties in the case as induced them to delay giving a decision upon it. But Lord Lyndhurst, who had least acquaintance, and indeed no acquaintance, with Scotch law, found no difficulty in the case whatever, and pronounced a final judgment upon it in the terms already narrated.

From the preceding narrative it is evident that in regard to the limitation to heirs-male in the patent of 1661, upon which the peerage claims from the first have been made to turn, there are many material circumstances in favour of the claim of Mr. Hope Johnstone. The resignation of 1657 affords important evidence in that direction. The favour which the sovereign had for the Earl of Annandale, and his showing that

<sup>1</sup> This case was a disputed contract of sale of coal and copper mines in Staffordshire. The purchaser alleged fraudulent representation on the part of the seller, and the evi-

dence was unprecedentedly voluminous and complicated.

<sup>2</sup> P. 43.

<sup>3</sup> *Life of Lord Lyndhurst*, by Sir Theodore Martin, pp. 220, 221.

favour in intrusting to his lordship's legal adviser the preparing of the patent for the peerages and of the signature for the Stewartry of Annandale ; the provision for heirs-female introduced into the patent at the earl's desire, and in accordance with the circumstances of his family ; the giving him of a crown charter, confirming to him his whole earldom, with the dignity of an earl, with the destination to heirs-female of his body, after the heirs-male of his body, and the granting of an Act of Parliament further to secure him and his posterity in these benefits—all these facts materially go to support the claim of Mr. Hope Johnstone. Yet the Committee of Privileges have rejected his claim, and laid upon him the burden of extinguishing the heirs-male general of the patentee before he can establish a claim to the peerages. Whether the peerages will ever be carried by a successful claimant, or whether they will become extinct, or whether evidence hitherto undiscovered will be brought to light which will effect a settlement of the peerage contest, the future alone can reveal. Meanwhile the family of Hope Johnstone have fought an honourable battle, and fought it in a way which must always be honourable to them.

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